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CIS

THE GENOCIDE CONVENTION

HEARING

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

EX. O, 81-1, THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, ADOPTED UNANIMOUSLY BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS IN PARIS ON DECEMBER 9, 1948, AND SIGNED ON BEHALF OF THE UNITED STATES ON DECEMBER 11, 1948

DECEMBER 3, 1981

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THE GENOCIDE CONVENTION

THURSDAY, DECEMBER 3, 1981

United States Senate,
Committee on Foreign Relations,
Washington, D.C.

The committee met, pursuant to notice, at 10:06 a.m., in room 4221, Dirksen Senate Office Building, Hon. Charles H. Percy (chairman of the committee) presiding.

Present: Senators Percy, Helms, Boschwitz, Pell, and Dodd.

The Chairman. This morning, the Committee on Foreign Relations will review the status of the International Convention on the Prevention and Punishment of the Crime of Genocide and the arguments for and against its ratification.

The Genocide Convention has been before the Senate for 32 years and has been reported favorably by this committee no less than four times.

This morning's hearings mark the 11th day since 1950 that this committee has convened to hear public testimony on the Convention. Yet it has been debated in the Senate at length only once, in 1974, when two attempts to break a filibuster mustered 55 votes, a majority of the Senate, but not the two-thirds that would be required for Senate approval.

Since that time, the principal organization opposing ratification, the American Bar Association, reversed its position and now strongly supports ratification. We will be hearing from the ABA later this morning. I am very pleased to indicate that, in addition to the distinguished Senators that we have with us this morning to start this hearing—who will be appearing on both sides of the issue—Senator Javits, our former colleague and the former ranking member of this committee, also will be here at around 11:30 to testify.

Speaking for myself—because this is not the kind of issue that sometimes we have when we hear an issue for the first time—I have participated in debates on this issue before, and my position on this treaty is reasonably well known. It has been publicized one way or the other, favorably and unfavorably, depending on the writer's point of view.

I support ratification of the Genocide Convention, as I have ever since coming to the Senate 15 years ago. It remains today what it was at the time of its original negotiation: an important statement by the nations of the world that those who would perpetrate the unspeakable crime of trying to exterminate a national, ethnic, racial, or religious group must not be allowed sanctuary anywhere in the world.

Yet, the significance of this convention is not merely symbolic. It forms part of a general network of treaties which declare certain actions to be international crimes, justifying concerted action by all countries to bring the perpetrators to trial. However new and untried this concept may have seemed to the Senate in 1949, there is nothing radical or unusual about it today. Just last summer, the Senate approved by a vote of 98 to 0 two treaties which provide for just such international action, the first against those who take hostages for political purposes, and the second against those who divert nuclear materials for unauthorized use.

Another such treaty directed against those who seize diplomats for political purposes provided an important basis for our case against the Government of Iran, and added to the wide condemnation of the ayatollah's government by the rest of the world for the holding of American hostages. If we can agree to condemn and seek to punish such violators of international law, why should we not agree to treat the perpetrators of genocide in the same manner?

In short, I think the Senate's original concerns and hesitations about the Genocide Convention have not stood the test of time. They were raised in the course of debate about the treaty power and about the authority of the Federal Government, which long since have been resolved. Most of the arguments which are made against ratification are either outdated, misinformed, or based upon farfetched interpretations of the treaty's provisions. The remaining arguments are simply not persuasive to me, nor do I think they would be to most Americans.

Ratification by the United States may be a very small step in the scheme of things, but it does no credit to a great nation like the United States to hesitate in taking a small step forward for reasons which are not sustained by a serious consideration of American interests in the world.

Clearly, the ultimate prospects for ratification of this convention will depend in large part on the position taken by the Reagan administration. During his recent confirmation hearing, the new Assistant Secretary of State for Human Rights and Humanitarian Affairs, Elliot Abrams, indicated that the administration had only just begun its review of this treaty. He expressed some initial and positive personal views on ratification of the Genocide Convention, which I hope will be widely shared in the rest of the Government.

I hope the committee's hearing this morning will assist in that process. It is my present intention to await the outcome of the administration's review before considering further action in the committee, provided that a reasonable time, and only a reasonable time, is taken by the administration in this regard.

Our first witness this morning is my esteemed colleague, the President pro tem of the Senate, the chairman of the Senate Judiciary Committee, Strom Thurmond of South Carolina, and my seatmate. We don't always agree as we sit alongside each other, as we probably will not agree this morning. But when we take into account that the American Bar Association, a highly respected organization, up until recently opposed this treaty, and had many reasons which it gave for that opposition, now has reversed its position, we know that good men are on both sides of this issue. This is not a clear-cut issue. The purpose of this committee's hearing is to give open hearing to those people for whom we have great respect, who have strong convictions on one side or another of the issue.

Senator Pell, do you have a statement that you would like to make?

Senator PELL. Thank you, Mr. Chairman, I do have a statement.

I thank you and our colleagues for holding this hearing which, as you pointed out, is the 11th public hearing conducted by our committee on this convention since it was submitted in 1949.

I know that I personally have voted on five separate occasions with a majority of our committee to report the convention to the floor of the Senate. But, for a variety of reasons, the Senate never has been able to vote on this issue.

I guess, too, this cause, this issue, has a rather personal meaning for me because my father, Herbert Pell, was Chairman of the United States Delegation to the United Nations War Crimes Commission. There he took a very hard line with regard to the crime that we now call "genocide."

Incidentally, "genocide" is a term that was coined by Raphael Lemkin after the war, during the early days when people were interested in this dreadful problem, having seen a race almost exterminated, and having seen the world do almost nothing about it. There was no name for this phenomenon, and at this hearing I think it is proper to pay proper tribute to Raphael Lemkin, the person who illuminated and secured common acceptance for the term "genocide," which was a crime so horrible that it had not had a term applied to it previously.

Because of my father's strong view that genocide should be considered a war crime, and because of the State Department's opposition to it at the time, because it was ex post facto, he lost his job. He offered to pay for the mission himself in London. In one way or another, he was fired from it, but he secured public support, and a few days later the administration turned around and said yes, genocide would be considered a war crime by the U.S. Government.

So, I have a personal interest in this. While my father has long been gone, I consider that one of the missions he would like to have seen accomplished was the fulfillment of the work of the United Nations War Crimes Commission performed in London at the end of World War II. The rest of the world behaved like ostriches, holding their heads in the sand, not wanting to see the horrors that were going on in the German concentration camps.

I think today's hearing is a good idea, and I would hope that by hearing both the pros and cons of this treaty we could move ahead toward ratification. As we do so, I think we should pay some silent tribute to Raphael Lemkin, who added so much to this whole cause.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Pell.

Just so that we do not give the impression that the Senate Foreign Relations Committee, its members having given two statements in favor of the treaty, is unified in its viewpoint, and is not a reflection of the difference of opinion that is held in the Senate, we will have an opening statement from Senator Helms, who may give a different impression than Senator Pell and I gave.

Senator HELMS. Thank you, Mr Chairman.

What you have said in a delicate way, in your customary, gentle way, is that I am about to be the party-pooper here this morning.

The truth is that what we are doing, as Sam Ervin puts it, is resurrecting an issue, a treaty, a consideration that long has been discredited, and that never has accumulated enough support in the U.S. Senate for ratification since it was signed in 1948. It won't be ratified this time either.

If you are contemplating that we will get 55 votes on cloture this time, I think you are overestimating the situation.

This hearing is an exercise in futility and a waste of time in terms of what I perceive to be any chance that this unwise Genocide Treaty will be ratified.

Now I say this with all due respect to my colleagues and to the ladies and gentlemen of the American Bar Association. And I do hope to welcome the Bar Association home as a prodigal child, returning to the point of wisdom on this and some other matters.

The very fact that more than three decades have passed since the treaty was signed has given us an opportunity to look at it in the light of entirely changed conditions and with greater experience in the development of international law and cooperation.

I believe that such a review easily will demonstrate what great folly it would have been to have ratified this so-called Genocide Treaty in 1948, and what supreme folly it would be to do so now.

Mr. Chairman, what this proposed treaty does is to create an entirely new theory of international law. Criminal law always has been a matter of purely domestic concern, and in using the word "concern," let me emphasize that I use it in purely a legal and technical sense and not in the humanitarian sense.

All of us, of course—all of us—are concerned in a human way about violations of fundamental human rights in other nations. But legally we are incompetent to do anything about it unless we wish to alter the most cherished premise of international relations, namely, the sovereign independence of nations.

If, by an act of our sovereign will, we submit our sovereignty henceforth to the will of the international community, we diminish our own Nation and the loyalty which we as citizens owe to that Nation. Criminal law goes to the very essence of security of a nation, unlike matters of purely international concern. If we allow the humanitarian sense of the word "concern" to cloud our judgment about the distinction between domestic and international jurisdiction, then we are disloyal to our Constitution and to our country.

I think that is the reason for the widespread and deep antagonism which American citizens feel toward the Genocide Treaty when its implications are explained to them.

I think that as Americans we sense a feeling of hostility toward our own notions of justice and equity. These are manifest in so many ways in our international relations. We have a unique development of legal history, the result of our traditions, our religions, our moral and our ethical values, and our experiences.

This Senator simply cannot see justification for submitting this tradition to the judgment of the world. It is noteworthy that the treaty imposes an obligation upon its adherents to pass implementing legislation to fulfill its purposes, and it is going to be interesting to see how that applies to the violent nations of this world. We will see whether these nations will sign the treaty and then regard it with only lip service.

This fact alone suggests the extent to which the U.S. Congress and the U.S. Constitution become subject to a higher decisionmaking authority. It is clear that the Senate, for example, in ratifying the treaty would impose an obligation upon the House to pass legislation which the House may not wish to pass. The resolution of such an obligation can be only to the disadvantage of the system of international law or to our own constitutional system.

Mr. Chairman, there are so many questions which arise and which will be examined in great detail by this committee with regard to international obligations, the Constitution, and the separation of powers. These problems will be examined in detail, if not in this committee then on the Senate floor itself, if this treaty should come to the floor, and if it ever should become the pending business.

The Senator from North Carolina, I would say, intends as respectfully as he knows how to participate in such a detailed examination.

I thank the chairman.

The CHAIRMAN. Thank you very much, indeed, Senator Helms.

Senator Boschwitz.

Senator BOSCHWITZ. Mr. Chairman, I find it absolutely shocking that the greatest democracy of the free world, the leader of the free world, finds it impossible to pass a treaty with respect to genocide, even though most of the nations of the world already have acted upon that treaty. Really, the only thing that stands in the way of passage of this, because a majority of the Senators certainly favor it, is the threat of a filibuster—and even after cloture is invoked that it will continue to be filibustered through procedural tactics.

It is absolutely shocking that the greatest democracy in the world, the leader of the free world, cannot bring itself to ratify the Genocide Convention.

When we think of the Armenians after World War I, the Jews after World War II, the Cambodians in more recent decades, the fact that we cannot ratify this treaty absolutely, in my judgment, brings shame upon our Nation.

We simply have to act and do everything that we can to bring about the end of genocide, to make sure that if it ever again occurs, that not only the press, but that we ourselves, bring it to the attention of the free world, of all of the world, in fact.

It is interesting to note that the genocide in Kampuchea probably got less public attention than some things which were within the range of the TV cameras.

We have to do what we can. We cannot fall back. We cannot deter in our efforts because of the threats of some Senators that this is going to be opposed on the floor. We already submit our sovereignty as a country in many regards. We submit it every day in the Senate. The will of the legislative process affects the people of our country.

I hope that we will go forward. I hope that we will make a test of it on the floor of the Senate. I hope that attention will be focused upon those people who oppose the idea of the Genocide Convention. One of the reasons I admire the Senator from Wisconsin so much is because not a day goes by without his reminding the country and the world of the horrors that occurred in the past and the horrors that we can help prevent in the future.

The CHAIRMAN. Thank you, Senator BOSCHWITZ.

Senator Dodd.

Senator DODD. Mr. Chairman, this hearing opens another opportunity to erase a blemish on our Nation's otherwise excellent record as a defender of the dignity and the integrity of the human race.

I am a newcomer to this debate in the Senate and first I'd like to pay respect to the outstanding—though so far unfortunately unsuccessful—efforts you, Mr. Chairman, of Senators Proxmire, Pell, Javits, and others for the ratification of the Genocide Convention. Reviewing the 32-year-old record of the convention, I was deeply impressed by their dedication and their mastery of the issues involved.

A much less positive impression I gathered from the record was about the quality of the objections to the convention. True, every treaty has to be carefully examined to determine whether it serves our national interest, and whether it conforms to our Constitution and our national policies. I certainly do not question the motives of Senators who had reservations about one provision or another and wanted to probe carefully the prospective consequences of ratification. This was their duty as Senators. As a result, however, during these 32 years every single word in the convention has been examined and reexamined, and every serious objection to the convention has been answered over and over again. I have not seen a single factual, well-reasoned paper lately in opposition to the convention.

This hearing will provide another opportunity for a point-by-point rebuttal of any ill-founded opposition. At this stage, let me just emphasize one very important point that has not been made quite clear during the previous hearings. It is the following: We are not talking about what will happen with innocent or guilty Americans abroad. The international community does not need our permission for the setting up of a process for the prevention and punishment of the crime of genocide. The Genocide Convention is existing international law for most of the world community and that includes all states of any significance with the exception of Communist China and the United States.

If an American is arrested anywhere in the 90 states that are parties to the convention for committing genocide he can be tried and punished perfectly legally in terms of international law, regardless of our ratification or nonratification. Whether he is charged lawfully or falsely, his situation would not be any worse in case of our ratification. Quite the contrary, only by virtue of our ratification would we gain any legal standing to intervene on his behalf and to try to gain his extradition to American jurisdiction. Our ratification has no bearing whatsoever on what happens abroad on the basis of the Genocide Convention, who is charged, who is convicted. By refusing to ratify, however, we deprive ourselves of the legal claim we would have for the extradition of an indicted American to the parallel American jurisdiction. Opponents of the ratification, therefore, are not helping but worsening the situation of an American who would be charged abroad, rightfully or falsely.

Mr. Chairman, I thought it very important to bring this out at the outset because one can easily get lost in the maze of the absurd claims against the Genocide Convention. This convention would not obligate us to do almost anything that we would not do otherwise. It would add the weight of our international prestige and authority to the condemnation of those who regard mass murder as a legitimate or, at least, convenient means of settling internal or international disputes. It would gain us access to what happens to this convention in the future, how it is implemented, an important development where presently we have no word at all, as we are not a party to the convention itself. The convention is not self-executing, so it would be valid domestically only through carefully crafted implementing legislation by the U.S. Congress. Every kind of behavior included in the convention's definition of genocide is already punishable under American domestic law.

By not ratifying, we exclude ourselves from the community of civilized nations who declared unanimously that genocide is a crime under international law and that states are obligated to prevent and punish it. Such a determination is not alien to our Constitution, in fact, it was envisaged by the framers when they provided in article 1, section 8, clause 10, that: "The Congress shall have power * * * to define and punish * * * offenses against the law of nations." What more essential "law of nations" could they have had in mind but the one protecting the bare existence of nations, racial, ethnic, and religious groups?

What strikes me the most in the arguments of those opponents of the convention who choose the role of protectors of our Constitution is how little faith they have in the strength of the Constitution and the soundness of our constitutional system. How ironic for them to assume our system would collapse under the burden of an obligation already assumed by 90 states around the globe, including all of our democratic allied friends.

Mr. Chairman, it is time for the Senate to end this procrastination. The very spirit and text of our Constitution and our profound belief in it mandates that we ratify the Genocide Convention.

The CHAIRMAN. Thank you, Senator Dodd.

The lines are drawn. I can only say, as chairman, that though Senator Helms and I disagree as to what the outcome ultimately will be in the Senate on this issue, we do not disagree, nor do I think our distinguished first and second witnesses will disagree, on the fact that once the chairman and ranking member of a committee decide to set a course, so far as the committee is concerned, there will be deliberation, due deliberation within this committee, and no member, I feel, will hold up this committee's acting and reporting on this treaty, up or down, for favorable or unfavorable action on the floor of the Senate.

I have decided that we should move ahead. I have the full concurrence of the ranking minority member and the majority of the committee. We intend to move ahead with this. The lines will be drawn in the committee as they will be drawn on the floor. I will do the best that I can see that this is not an exercise in futility. It is a very important issue, and I think its importance is evidenced by our distinguished first witness.

We are very pleased to have Senator Strom Thurmond with us today.

Senator Thurmond, we are pleased to receive your statement.

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM SOUTH CAROLINA

Senator THURMOND. Thank you very much.

Mr. Chairman, it appears that a majority of the Foreign Relations Committee probably will favor this treaty, as it has in past years. But I predict that the Senate will do as it has in past years, too, and not ratify the treaty.

There is good reason for this, and I want to present those reasons to you this morning.

Vietnam, over the past several years, reportedly has used poison gas in a large-scale attempt to exterminate several anticommunist tribal groups. On June 9, 1981, Vietnam became party to the Convention on the Prevention and Punishment of the Crime of Genocide—the Genocide Treaty.

The point is this: The Genocide Treaty, where it should restrain atrocity, is not observed; and where it would be observed, it is unnecessary. In the barbaric nations of the world, the treaty is given lip service. In our civilized free republic, the treaty would be followed to the letter and thus could harm irreparably the fabric of our constitutional system.

I welcome the opportunity to testify against the Genocide Treaty because, in my view, the time has come for the President to request the return of the treaty so that the Senate will not year after year face needlessly an issue which already has been effectively resolved and which is wasting the time of this institution to no good purpose whatsoever.

I have today written to the President to express that opinion, and I am hopeful that he will request the return of the treaty without further delay. Thirty-two years of Senate consideration is long enough.

In my view, the individuals who seek Senate consent to ratification of the Genocide Treaty do not understand the legal effect of such action in terms of the domestic law of the United States.

Unlike many other nations of the world, our Constitution provides that an international treaty shall become "the supreme law of the land" and shall have the status of supreme law for all purposes of domestic law—I repeat, domestic law—in binding the conduct of American citizens and the States.

In our federal system, a treaty does much more than simply to bind the international conduct of the Federal Government as a contracting state.

In the United States, the Genocide Treaty would become both an international contract between the United States and the other contracting states, and it would become binding domestic law, which immediately would supersede all law and practice inconsistent with the treaty.

The treaty, being later in time, would nullify all provisions of acts of Congress and of all prior treaties of the United States which were inconsistent with the provisions of the Genocide Convention.

Mr. Chairman, I am confident that virtually all Americans abhor even the thought of genocide. Every thoughtful American should, however, analyze the actual effect that the Convention would have within the United States, if the Senate makes the error of consenting to its ratification and if the President thereafter proceeds to ratify the treaty and thus causes it to become law.

Controversy surrounds almost all of the 19 separate articles of the convention. I will deal here with a few major points.

Article I states, and I quote:

"The contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

Article IV provides, and I quote:

"Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals."

I especially call your attention to the words "private individuals."

Article III specifies:

"The following acts shall be punishable: (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide."

Mr. Chairman, questions concerning fundamental concepts naturally arise as a first issue.

The 1973 Senate Foreign Relations Committee report states that genocide would simply be added to a list of other agreements such as "the protection of submarine cables * * * and antisocial conduct like slave trading." That statement is a dangerous and erroneous oversimplification.

The Convention would create a series of new crimes as the supreme law of the United States. Under the Constitution, these new crimes would "be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Matters concerning fundamental criminal conduct involving murder or conspiracy to commit murder should be primarily a matter of State domestic jurisdiction—I repeat, State domestic jurisdiction. The use of the treatymaking power in this area is inappropriate. In effect, the Convention would continue the policy made possible by the Supreme Court in its decision in *Missouri* v. *Holland*, 252 U.S. 416, in which the court held that State powers could be transferred to the Federal Government through the treatymaking process as a de facto method of amending the Constitution.

Mr. Chairman, moreover, the Convention, if ratified, would nullify article II, paragraph 7, of the Charter of the United Nations, which expressly prohibits that organization from intervening in matters within the domestic jurisdiction of a country by the method of making treaties on domestic subjects within the jurisdiction of member countries and, in the case of the United States, within the jurisdiction of either the Federal Government or of individual sovereign States.

The treaty defines "genocide" as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such."

Insofar as the specified acts are already prohibited by law when done against individuals, it is novel to contend that the nature of the crime changes when committed against the same individuals as a group.

In other words, under our common law tradition and, indeed, as part of our religious heritage, to murder one man, for whatever reason, is as inherently evil as to murder a group. That concept has done more in America to prevent genocide than any treaty ever could do. Ironically, the Genocide Treaty would erode that concept by implying that the life of a group, or of a group member, is somehow more valued than the life of an individual.

We should not wonder, then, that the term "genocide" is loosely thrown at the United States by Communist and Third World countries in the United Nations when those very countries have, by their own conduct, ignored the sacredness of individual life. Our society is built on respect for the individual, a respect which makes genocide impossible.

There are other less philosophical and more technical objections to the treaty. For example, article VI of the Convention would permit persons charged with genocide to be tried by "such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction."

Admittedly, there is now no international penal tribunal of that type in existence, and it is unlikely that the United States would accept the jurisdiction of such an international tribunal, should one be established. However, the fact remains that, if the Convention were ratified, a future administration could agree to accept the jurisdiction of an international penal tribunal and American citizens could be called before that tribunal to answer for an international crime without any—I repeat, without any—of the guarantees given a criminal defendant by the Constitution of the United States.

Presumably, our courts would hold unconstitutional any proposal to send a person charged with a crime committed within the United States outside the country for trial; but that is a risk we ought to not take.

I am concerned, too, that article VII provides as follows:

> Genocide and the other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition.
>
> The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Mr. Chairman, that article would void the provisions found in most extradition treaties which allow the United States to refuse extradition for offenses determined to be of a political or military nature.

For example, a serviceman could be charged with the crime of genocide for fighting enemy soldiers in a country which had contracted with the United States for the extradition of American nationals. The extraditing state would assert that the soldier was guilty of genocide, and under the terms of the Genocide Convention, the United States would not be in a position to refuse extradition on grounds that the crime charged was a political or military offense.

Mr. Chairman, there also is great potential for abuse of the terms of article IX of the Convention. That article provides that disputes between the contracting parties, "including those relating to the responsibility of a state for genocide or for any of the other acts enumerated" must be submitted to the International Court of Justice at the request of any party—I repeat, any party—to the dispute.

Under that provision, Vietnam could have charged the United States with genocide in Vietnam and brought the issue before world public opinion, using the forum of the International Court of Justice. Similarly, the Soviet Union could allege that the murder or other act of violence against an individual member of a minority group within the United States constituted genocide, and wage an unfounded propaganda campaign, again using the International Court of Justice as a public forum.

Mr. Chairman, the committee also should consider carefully the potential impact of the provision of article III which makes criminal "direct and public incitement to commit genocide."

During the hostage crisis in Iran, any number of Americans urged massive military action against Iran in retaliation for the hostage seizure. Regardless of the wisdom of that form of outcry, it was protected speech under the first amendment of the U.S. Constitution.

Should the Genocide Treaty become supreme law, the incitement provision of article III, at a minimum, would chill free speech in any area which might be interpreted by any contracting state as "incitement to commit genocide."

Using the incitement provision, Iran, as a contracting party, could have called the United States before the International Court of Justice for permitting editorial writers, citizens groups, and even individual citizens, the freedom to urge the bombing of Iran.

Mr. Chairman, these, then, are some of the many legal and political problems which ratification of the convention undoubtedly would cause.

The convention has proven ineffective where true genocide has been committed. Where there is no danger of genocide being committed, the convention only would serve the enemies of freedom in their effort to propagandize against the United States and to disrupt our internal domestic liberties.

Mr. Chairman, in preparing this statement, I was impressed by the testimony given in 1950 by Charles B. Rix, vice chairman of the special committee on peace and law of the American Bar Association. At that time, Mr. Rix stated that the Genocide Treaty would change the traditional concept of international law as the law of the relations of states to each other into the law of "relations of states and individuals in states, thereby imposing individual liability for international law and creating unknown individual rights."

The Genocide Convention is uncharted water alien to our free traditions and fundamentally dangerous to our sovereignty and unique institutions.

Mr. Chairman, I urge no action on the convention, other than its return to the President without Senate consent.

I want to say something about the atrocities of World War II. I fully appreciate that fact. I was with the First Army in Europe, and I was there at the surrender. The First Army uncovered the Buchenwald Camp. I have never seen such atrocities in my life. No one who has a humanitarian thought at all, a feeling of compassion and love of humanity would condone such acts. But, Mr. Chairman, again, I repeat that this is not the point here. We all are against atrocities such as that. We are against genocide. But are we going to pass a treaty that can permit Americans, because of some alleged act committed, to be sent to another country for trial in violation of the Constitution of the United States?

I don't think so. I don't think the Senate will approve it. I don't think the American people approve of it.

I hope they won't.

Thank you very much.

The Chairman. Thank you very kindly, Senator Thurmond.

Senator Thurmond, we do have a vote on the floor right now on the prior amendment, an up-or-down vote. I think it would be well if I could try to finish my questions of you so that you and I then could go down to vote, along with Senator Pell. Senator Boschwitz has gone to vote and will shortly return. In this way we can keep the continuity of this hearing going.

Senator Thurmond. I have another meeting at a quarter to 11, but I would be glad to come back at a later time, if you desire, to answer your questions.

The Chairman. Well, then, let me just put a few questions to you and you can expand on the answers for the record later.

Senator Thurmond. Would you care just to state your questions and let me answer them all for the record in light of my other engagement?

The Chairman. Yes.

First, because you do work more closely than anyone else with the ABA, I would appreciate your judgment—I think we have time for one or two questions, Senator.

Senator Thurmond. I would be very pleased if you would submit all of your questions. I really must leave now to vote and I do have another engagement. I am sorry that I don't have time now to respond to your questions.

The Chairman. Fine, Senator. We will submit our questions to you in writing.

Thank you very much.

Senator Thurmond. I thank the committee for its attention.

The Chairman. Thank you.

The committee would like to acknowledge the presence of Senator Javits. We had previously announced that Senator Javits would be here today.

Senator Javits, please feel free to take a place at the table. Senator Proxmire is voting and will be back to give his testimony, and you can immediately follow him. You can take your place at the table now, if you like, or wait until he is finished.

The committee will recess for a few minutes until Senator Boschwitz and Senator Proxmire return.

[A brief recess was taken.]

Senator Boschwitz [presiding]. We will continue the hearing. The chairman will join us in a few moments, when he returns from voting.

We will now continue the hearing with our colleague, Senator William Proxmire, from Wisconsin.

For some period of time now—how many years has it been, Senator?

Senator Proxmire. I think 13 years, Mr. Chairman.

Senator **Boschwitz.** Every day for the past 13 years you have spoken on the floor of the Senate with respect to genocide.

Senator **Proxmire.** Well, I've missed a few days, but it's been almost every day.

Senator **Boschwitz.** You haven't missed any votes in that time, though.

Senator **Proxmire.** No.

Senator **Boschwitz.** It is a great pleasure to have you before us. As you know, my thoughts in this matter are similar to yours.

One of the first things I did upon arrival here in Washington nearly 3 years ago was to come to you to say that I supported your view and that I admired your daily reminders to the American people and the world of the crime of genocide.

It is with great pleasure that we receive your testimony this morning.

STATEMENT OF HON. WILLIAM PROXMIRE, A U.S. SENATOR FROM WISCONSIN

Senator **Proxmire.** Thank you very much, Senator Boschwitz. I recall that very well. I cannot tell you how heartening it is to have you indicate your strong support for the Genocide Treaty.

Mr. Chairman, I think we should take a minute to dwell on the term "genocide," because this is an absolutely appalling crime. It is the planned, premeditated, calculated destruction of an entire ethnic, racial, national, or religious group. It is often carried out by a government. It is different than murder and is very hard to reach. Only with the force of world opinion and a formal treaty can we make any real progress against genocide.

There are some people who oppose the Genocide Treaty who deny that the Holocaust in Europe, via Nazi Germany, took place before and during World War II. We know of the terrible evidence that it did take place. Six million Jews were exterminated. Only 300,000 remained, a pathetic remnant. It was a program of governmental extermination, far different than any other crime. As I have said, it only can be reached or begin to be reached by a treaty of this kind.

I might just mention in passing that any reference to the notion that this does not reach an act of war is true. It is not purported to reach any act of war. War is different. Poison gas used in war is something else. This does not try to reach every atrocity in the world. But the planned and premeditated destruction of an entire group it does reach. That is its purpose.

Mr. Chairman, I do want also to say how honored and delighted I am to see that you have also as a witness in this room, testifying a little later, Senator Javits. Senator Javits has devoted his enormous talents to this cause. I think that for years, without question, he was the leading intellectual light in the Senate, the brightest Senator who served certainly during the 24 years I served in the U.S. Senate. He is not only an extraordinarily intelligent man, but has a great character and understanding.

In fact, I would say there is no one with whom I have been privileged to serve who has had a more incisive intellect. I admire him for the fact that we were often overwhelmed by the forcefulness of his arguments on behalf of the weak and the powerless in our society.

I was always impressed with his very real and deeply moving support for human rights across the world.

Senator Javits has been a guiding light and a trusted ally in the fight for ratification of the Genocide Convention, and it is good to welcome him back to the fight.

Also, I would like to say a word about Bruno Bitker, who will be addressing the committee as a member of the next panel. Mr. Bitker is one of my most valued constituents from Milwaukee. He is one of the foremost experts on the Genocide Convention. He has served as the U.S. representative to the International Conference on Human Rights in Tehran in 1968. He was chairman of the Governor's Commissions on the United Nations in Wisconsin, and has been a longtime chairman of various panels of the American Bar Association. I am sure his insights will be of great value.

I want to commend Senator Percy, the chairman of this committee, for the priority he has given this important human rights treaty since assuming chairmanship of this committee. His efforts here today are continuing a long and bipartisan tradition of support for the Genocide Convention, which has been marked by four reports to the Senate from this committee, each enthusiastically recommending ratification. The commitee's tireless efforts to restore America's proper role as a world leader on human rights will not go unnoticed when the Senate ratifies the Genocide Convention, which I am confident it will.

Chairman Percy is right to be moving ahead now. This is an opportune moment.

First, we have a new administration, in office nearly a year now, and it is time to get it on record. In announcing the appointment of Elliot Abrams as the State Department's new Human Rights Coordinator, Secretary Haig pledged to restore human rights as a priority within our foreign policy. This is a welcome step.

Mr. Chairman, I regret that you enter the room only after I have paid tribute to you.

You are a very modest man.

The CHAIRMAN [presiding]. It's just as well that I did.

Actually, I stood outside the door, listening. [General laughter.]

Senator PROXMIRE. Your modesty is overwhelming.

Second, we have a new international climate which firmly underscores the need for the United States to regain the high moral ground in our competition with those who wish us ill. We have yielded this ground all cavalierly by smugly asserting that our own record speaks for itself. It is a luxury that we can ill afford if our diplomats are to speak out, and speak out forcefully, against the repressive actions of closed, totalitarian societies.

Third, we have a new Senate. Thirty-eight Members have been elected since your last hearings in 1977. Your own committee reflects that change, Mr. Chairman. Only 6 of the current 17 members served on this committee during the 1977 hearings, and only 1, Senator Pell, was here when I testified during the 1970 hearings. A new hearing record will be helpful in dispelling any lingering arguments of the opponents of this convention so that at long last we can proceed to ratification.

Mr. Chairman, in reviewing your earlier hearings, I was impressed by the great lengths to which your committee has gone to consider every argument, allegation, and concern raised by the opponents of this convention. The accumulated testimony effectively refutes those arguments, demonstrating that the Genocide Convention, together with the understandings recommended by the committee, deserves our wholehearted support.

That review has shown that the Genocide Convention really has two aspects.

First, it is a human rights treaty, which seeks to protect the most fundamental right known to mankind, the precious right to live.

Second, it is an international criminal treaty: A treaty designed to insure that all nations, consistent with their own constitutions, will do everything possible to punish criminals who attempt to commit the most heinous crime—the elimination of an entire national, ethnic, racial, or religious group.

The history of the Genocide Convention is clear on the second point. The fact that the Genocide Convention evolved from the outrage of all decent human beings to the monstrous actions of the Nazis in attempting to eliminate every man, woman, and child of Jewish ancestry within their borders is apparent to everyone.

What is not as apparent is the fact that the Genocide Convention exists because the International Military Tribunal at Nuremberg determined that consideration of genocide was outside the charter that established their Tribunal.

International reaction was swift. The General Assembly, with our support and encouragement, unanimously adopted a resolution declaring genocide an international crime. I was delighted that the distinguished ranking minority member, Senator Pell, was able to tell us this morning about the absolutely vital role that his father played in this.

In the next 2 years, the Secretary General's office, the Economic and Social Council and a drafting committee, chaired by the U.S. delegate, John Maktos, labored to draft a convention which would implement the General Assembly's resolution. In 1948, the General Assembly, with the enthusiastic support of the U.S. delegation, unanimously adopted the Genocide Convention, and 2 days later, the United States signed the Convention.

Mr. Chairman, since President Truman submitted the Genocide Convention to the Senate for ratification in 1949, this treaty has had the broad support of Americans across the country. President after President, administration after administration, Republican and Democrat, have given this treaty their enthusiastic support.

This is not a partisan issue. It is not ideological.

The ranks of the Genocide Convention supporters cross party lines and ideological lines.

In fact, you will be hearing very shortly from the Ad Hoc Committee on the Genocide and Human Rights Treaties, a coalition of 52 labor, civic, religious, and nationality organizations, representing millions, literally tens of millions, of Americans across this country, including every major religious group—Catholic, Protestant, Jewish, and others.

Why do they support the Genocide Convention, Mr. Chairman? Well, in the first place, they support it because in their consciences they know it is right. They know the terrible price that we pay when we are silent in the light of actions of this kind.

But they support it also because it will serve America's interests, the interests of our citizens, our voters, and our taxpayers.

The benefits of this treaty are not elusive. They are real and concrete.

Let me just cite a few of the reasons for ratification.

First, ratification of the Genocide Convention will strengthen our hand in attacking the gross violations of human rights by the Soviet Union and its allies.

If the Vietnamese Communists commit genocide against religious groups in Cambodia, I want the United States to tell the world about it without challenge to our human rights dedication from other Communist nations.

The People's Republic of China systematically commits genocide against the Tibetans. I want us to be free to condemn that action without the inevitable propaganda about our failure to pass the Genocide Convention.

If one day the Russians turn against one of their national minorities and commit genocide, then the United States should be the world leader opposing that action. Nothing less should be expected from this Nation. But we will be unable to do this effectively without the passage of the Genocide Convention.

In sum, it is unlikely that genocide will be committed in any Western democratic nation. It is more likely that genocide will occur in nondemocratic, totalitarian, or Communist states. We need every device at our disposal to preclude that this happens; and, if it does occur, God forbid, we need every diplomatic, economic, and possibly military asset to stop such events.

We cannot do moral battle against genocide with one hand tied behind our backs.

Second, ratification of the Genocide Convention reasserts our intention to deal firmly with criminals who have violated the most sacred right known to man.

Third, the ratification of the Genocide Convention will help our relations with Third World nations as well.

Fourth, the ratification of this Convention will place the United States in a better position to bring our moral influence to bear in specific cases where genocide is alleged.

Finally, there is a moral imperative to ratify this treaty. Domestic statutes regarding murder are insufficient for, as Senator Javits has pointed out correctly, "genocide is murder and more."

Mr. Chairman, I have not attempted in my statement to provide a line by line discussion of the Genocide Convention and the arguments that will be raised by the Liberty Lobby later in this hearing. Your next panel will be addressing those questions, and I merely have attempted to set the stage for that discussion.

However, I would like your permission to include as a permanent part of this record my full statement and other material which I believe will be helpful to the committee's review.

Mr. Chairman, the fight for ratification of this Convention often has been frustrating. Senator Javits noted during the 1977 hearings, and I quote:

> The numbers of rumors, innuendos, misconceptions and scares that have been spread about this treaty are literally endless, and this has been done by people who are very, very competent and able in many other ways, but who somehow have an absolute blind spot on this one.

Mr. Chairman, some opponents of the Genocide Convention want it both ways.

On the one hand, they assert that the Genocide Convention is a strong document, threatening our very civil liberties, a position which simply is not substantiated by this committee's own hearing record. On the other hand, they argue that the treaty is a "paper tiger." Where is the real enforcement authority, they ask? Yet, this question comes most often from those who would oppose any international enforcement mechanism the most.

Let me set the record straight.

This Senator is no advocate of one world government. This Senator does not support any super government with "enforcement authority" to interfere in our internal affairs. I do not believe in yielding U.S. sovereignty in any way. This treaty does not do that.

This is a very limited treaty, not a panacea for the world's ills, not a step toward one world government.

But, it is an important moral statement, a strong diplomatic tool in the hands of the world's most powerful and influential country.

Thank you, Mr. Chairman.

[Senator Proxmire's prepared statement follows:]

Prepared Statement of Hon. William Proxmire

Thank you, Mr. Chairman.

I particularly want to commend you for the priority you have given this important human rights treaty, since assuming chairmanship of this Committee. Your efforts here today are continuing a long and bipartisan tradition of support for the Genocide Convention, which has been marked by four reports to the Senate enthusiastically recommending ratification. The Committee's tireless efforts to restore America's proper role as a world leader on human rights will not go unnoticed when the Senate ratifies the Genocide Convention.

Mr. Chairman, you are right to be moving ahead now. This is an opportune moment.

First. We have a new Administration—in office nearly a year now—and it is time to get them on record. In announcing the appointment of Elliot Abrams as the State Department's new Human Rights Coordinator, Secretary Haig pledged to restore human rights as a priority within our foreign policy.

Second. We have a new international climate which firmly underscores the need for the United States to regain the high moral ground in our competition with those who wish us ill. We have yielded this ground all too cavalierly by smugly asserting that our own record speaks for itself. It is a luxury that we can not afford if our diplomats are to speak out, and speak out forcefully, against the repressive actions of closed, totalitarian societies.

Third. We have a new Senate. Thirty-eight Members have been elected since your last hearings in 1977. Your own Committee reflects that change, Mr. Chairman. Only six of the current seventeen Members served on this Committee during the 1977 hearings and, only one, Senator Pell, was here when I testified during the 1970 hearings. A new hearing record will be helpful in dispelling any lingering arguments of the opponents of this Convention so that we can at long last proceed to ratification.

A TREATY TO PUNISH CRIMINALS

Mr. Chairman, in reviewing your earlier hearings, I was impressed by the great lengths to which your Committee has gone to consider every argument, allegation and concern raised by the opponents of this Convention. The accumulated testimony effectively refutes those arguments, demonstrating that the

Genocide Convention, together with the Understandings recommended by your Committee, deserves our wholehearted support.

As I pointed out during my testimony in 1977, few treaties have ever received the type of detailed line by line, word by word, syllable by syllable scrutiny that the Genocide Convention has received.

That review has demonstrated that the Genocide Convention really has two aspects.

First, it is a human rights treaty, which seeks to protect the most fundamental right known to mankind—the precious right to live.

Second, it is an international criminal treaty. A treaty designed to ensure that all nations, consistent with their own Constitutions, will do everything possible to prevent and punish criminals who attempt to commit the most heinous crime—the elimination of an entire national, ethnic, racial and religious group.

The history of the Genocide Convention is clear on that second point.

The fact that the Genocide Convention evolved from the outrage of all decent human beings to the monstrous actions of the Nazis in attempting to eliminate every man, woman and child of Jewish ancestry within their borders is apparent to everyone.

What is not as apparent is the fact that the Genocide Convention exists because the International Military Tribunal at Nuremberg determined that consideration of genocide was outside of the charter that established their Tribunal.

International reaction was swift. The General Assembly, with our support and encouragement, unanimously adopted a resolution declaring genocide an international crime. In the next two years, the Secretary General's office, the Economic and Social Council and a drafting committee, chaired by the United States delegate, John Maktos, labored to draft a Convention which would implement the General Assembly's resolution. In 1948 the General Assembly, with the enthusiastic support of the United States delegation, unanimously adopted the Genocide Convention and two days later the United States signed the Convention.

AMERICANS SUPPORT THE GENOCIDE CONVENTION

Mr. Chairman, since President Truman submitted the Genocide Convention to the Senate for ratification, this treaty has had the broad support of Americans across the country as well as their leaders.

President after President, Administration after Administration, have given this treaty their enthusiastic support—Republicans and Democrats alike, conservative and liberal alike.

This is not a partisan issue. It is not ideological.

The ranks of the Genocide Convention supporters cross party lines and ideological lines.

In fact, you will be hearing very shortly from the Ad Hoc Committee on the Genocide and Human Rights Treaties, a coalition of 52 labor, civic, religious and nationality organizations, representing millions of Americans across this country.

GENOCIDE CONVENTION IS IN THE INTEREST OF ALL AMERICANS

And why do they support the Genocide Convention, Mr. Chairman?

Because it will serve America's interests. The interests of our citizens, our voters, our taxpayers.

The benefits of this treaty are not elusive. They are real and concrete.

Let me just cite a few of the reasons for ratification.

First, ratification of the Genocide Convention will strengthen our hand in attacking the gross violation of human rights by the Soviet Union and its allies. While the treaty itself is narrowly constructed, your 1970 hearing record makes it clear how this treaty will help.

Rita Hauser, a Republican respected on both sides of the aisle, and President Nixon's delegate to the Human Rights Commission, testified:

"We have frequently invoked the terms of this Convention as well as the provisions of the Universal Declaration on Human Rights . . . in our continued aggressive attack against the Soviet Union for its practices, particularly as to its large Jewish communities, but also as to the Ukranians, Tartars, Baptists and others. It is this anomoly . . . (that) . . . often leads to the retort in debates plainly put, simply put, "Who are you to invoke a treaty that you are not a party to?' "

The 1977 hearings provide other devastating examples:

"The Soviet Union, usually on the defensive when the issue of . . . human rights was proposed at the U.N., could and would charge the U.S. with hyprocrisy. In January, 1964, for example, when the U.S. member of the Subcommission on Prevention of Discrimination, Morris Abram, advocated forceful measures of implementation' in dealing with racial and ethnic discrimination, this Soviet colleague had but to remind the body that the U.S. was not even a contracting party to the Genocide Convention. . . .

"Two years later, Abram . . . vigorously endorsed a Costa Rican proposal that would have marked a significant breakthrough in the area of international human rights enforcement. . . . The Soviet Union's response was devastating. Its representative pointed out that in view of the fact that Americans 'resolutely refused to accept legal obligations' through ratification of human rights treaties, it was 'almost indecent' and certainly 'hypocritical' for the U.S. to advocate the establishment of special human rights institutions in the international field. Shortly afterward, Pravda drove the point home. . . . It was 'no accident', the Communist Party organ commented, that the U.S. had not ratified the Genocide Convention since 'racial and national oppression is still very widespread in the United States of America.'"

Our representatives to the Helsinki Accord review conferences make a similar point. That where the United States should be on the offensive, holding the feet of the Soviet Union and its allies to the fire to live up to their pledges on human rights, instead we spend our time apologizing for our record on ratification of human rights treaties.

Mr. Chairman, the time has long since passed when we can smugly sit back and assume that our human rights record—which I firmly believe is the finest in the world—speaks for itself. Why permit Communist nations, which all too often only give lip service to these obligations, to take the high moral ground in these debates? Mr. Chairman, they have no right to it and we are foolish to abandon it to them.

If the Vietnamese communists commit genocide against religious groups in Cambodia, I want the United States to tell the world about it without challenge to our human rights dedication from other communist nations.

If the People's Republic of China systematically commits genocide against the Tibetans, I want us to be free to condemn that action without the inevitable propaganda about our failure to pass the Genocide Convention.

If one day the Russians turn against one of their national minorities, and commit genocide, then the United States should be the world leader opposing that action. Nothing less should be expected from this nation. But we will be unable to do this effectively without passage of the Genocide Convention.

In sum, it is unlikely that genocide will be committed in any Western democratic nation. It is more likely that genocide will occur in non-democratic, totalitarian or Communist States. We need every device at our disposal to preclude that this happens, and if it does occur, God forbid, we need every diplomatic, economic and possibly military asset to stop such events.

We cannot do moral battle against genocide with one hand tied behind our backs.

Second, ratification of the Genocide Convention reasserts our intention to deal firmly with criminals who have violated the most sacred right known to man.

There is firm precedent for ratification of this type of criminal treaty. Just this year, in July, the United States approved a treaty dealing with hostages, unanimously. We were following the same policy on issues such as narcotics (1961), pollution of the sea by oil (1954) and treatment of prisoners of war (1949).

Contemporary practice makes it clear that the Senate has the authority to approve treaties involving international treaties and to hold Americans accountable for their actions before American Courts (as the Genocide Convention and its implementing legislation provides) for actions committed abroad.

Third, the ratification of the Genocide Convention will help our relations with Third World nations as well. Our failure to ratify a treaty so consistent with the high ideals expressed in our Declaration of Independence, Constitution and Bill of Rights, places us in dubious company with nations such as South Africa whose dedication to human rights is clearly questionable. With all other major Free World countries supporting the Convention, our inaction raises unnecessary doubts regarding our ability to lead.

Fourth, the ratification of this Convention would place the United States in a better position to bring our moral influence to bear in specific cases where genocide is alleged. For example, in the early seventies the State Department wrote to me, indicating that our efforts to halt the genocide of Biafrans during the Nigerian civil war would have been strengthened immeasurably had we been a party to the Convention.

Finally, there is a moral imperative to ratify this treaty. Domestic statutes regarding murder are insufficient for, as Senator Javits has correctly pointed out, "genocide is murder and more."

The different effect of this type of treaty is impossible to quantify but, as Bruno Bitker noted during your 1970 hearing, "The requirements of morality are more likely to be recognized if they are also the requirement of law."

SUBMISSIONS FOR THE RECORD

Mr. Chairman, I have not attempted in my statement to provide a line by line discussion of the Genocide Convention and the arguments that will be raised by Liberty Lobby later in this hearing. Your next panel will be addressing those questions and I have merely attempted to set the stage for that discussion.

However, I would like your permission to include as a permanent part of this record, at the conclusion of my statement, material which I believe will be helpful to the committee's review:

"(1) An article by article analysis of the Genocide Convention just produced by the Congressional Research Service at my request. I have also provided additional copies to every Member of the Committee.

"(2) Copies of speeches which I have made responding in detail to the arguments of the new Liberty Lobby White Paper on the Genocide Convention, about which you will be hearing more shortly.

"(3) Letters from each branch of the Armed Services and the General Counsel of the Defense Department during the Carter Administration, outlining their support for the Convention.

"(4) A listing of 52 labor, civic, religious and nationality groups which endorse the Genocide Convention.

"(5) A law review article by Louis Henkin from the April, 1968 issue of the University of Pennsylvania Law Review entitled 'The Constitution, Treaties and International Human Rights', which conclusively proves the constitutionality of treaties such as the Genocide Convention."

Mr. Chairman, the fight for ratification of this Convention has often been frustrating. As Senator Javits noted during the 1977 hearings, "The numbers of rumors, innuendos, misconceptions and scares that have been spread about this treaty are literally endless, and this has been done by people who are very, very competent and able in many other ways, but who somehow have an absolute blind spot on this one."

IN CONCLUSION

Mr. Chairman, some opponents of the Genocide Convention want it both ways.

On the one hand, they assert that the Genocide Convention is a strong document, threatening our very civil liberties—a position which is simply not substantiated by this Committee's own hearing record.

On the other hand, they argue that the Treaty is a "paper tiger". Where is the real enforcement authority they ask? Yet this question comes most often from those who would oppose any international enforcement mechanism the most.

Let me get the record straight.

This Senator is no advocate of One World government.

This Senator does not support any Super Government with "enforcement authority" to interfere in our internal affairs.

I do not believe in yielding United States sovereignty in any way.

And this Treaty does not do that.

This is a very limited Treaty. Not a panacea for the world's ills. Not a step toward One World Government.

But it is an important moral statement, a strong diplomatic tool in the hands of the world's most powerful and influential country.

[Annex 1]

THE GENOCIDE CONVENTION: AN ARTICLE-BY-ARTICLE ANALYSIS*

This report will present an article-by-article analysis of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide. The Convention was transmitted to the Senate for its advice and consent by President Truman in 1949, S. Exec. O, 81st Cong., 1st Sess., and has been the subject of four sets of Senate hearings since then. The report will discuss Articles I through IX the Convention's substantive provisions, with attention to any legal developments taking place since the publication of article-by-article analysis, found in S. Exec. Rep. No. 23, 94th Cong., 2d Sess. (1976).

ARTICLE I

Article I.—The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article I makes genocide a crime under international law, impliedly recognizing both the theory and the practice that individuals, as opposed to nations, have rights and duties under the law of nations. Already punishable under treaties to which the United States is a party are activities such as hijacking, pelagic sealing, destroying submarine cables, sabotage, narcotics abuse, and slave trade and slavery, although these treaties generally commit enforcement exclusively to the domestic jurisdiction of each treaty Party.

It has long been held that treaties must deal with matters of "international concern," a principle engendering debate over whether human rights treaties, and the Genocide in particular, can be so characterized. While the language of the United States Constitution does not expressly restrict the treaty power in this way, the limitation has been suggested in Thomas Jefferson's *Manual of Parliamentary Practice*, various Supreme Court decisions, and the unofficial remarks of Justice Charles Evans Hughes, and has been incorporated in the *Restatement of Foreign Relations Law.*

In his *Manual of Parliamentary Practice*, Jefferson notes several constitutional limitations on the treaty power, including the requirement that the treaty "concern the foreign nation, party to the contract" and that the object be one that is "usually regulated by treaty, and cannot be otherwise regulated." These contentions have had considerable support in court decisions and legal scholarship. For example, in *Geofroy* v. *Riggs*, 133 U.S. 258 (1890), the Supreme Court stated that the treaty power "extends to all proper subjects of negotiation between our government and the governments of other nations," *Id.* 267. The Court later observed, in dicta, that treaties may deal with "all subjects that properly pertain to our foreign relations." *Santovincenzo* v. *Egan*, 284 U.S. 30, 40 (1931). While the Supreme Court has yet to strike down a treaty on the grounds that it does not deal with a matter of international concern, a Federal appeals court used this justification to invalidate a Senate reservation to a United States-Canada treaty on Niagara River water allocation. *Power Authority of New York* v. *Federal Power Commission*, 247 F.2d 538 (D.C. Cir.), *vacated as moot*, 355 U.S. 64 (1957). In addressing the American Society of International Law, Justice Charles Evans Hughes noted that although there is no explicit constitutional restraint on the treaty power, the nature of this power might impliedly limit its use to matters "relating to foreign affairs," and prohibit its exercise "to make laws for the people of the United States in their internal concerns." 23 Proc. Am. Soc'y Int'l L. 196 (1929). The same notions have been embodied in the *Restatement (Second) of Foreign Relations Law of the United States* § 117(i)(a) (1965), which states that the United States has the power to enter into an international agreement if, *inter alia*, the subject matter of the agreement is of international concern. However, a comment to the provision notes that such matters "are not confined to matters exclusively concerned with foreign relations. Usually, matters of international concern have both international and domestic effects, and the existence of the latter does not remove a matter from international concern." *Id.* § 117, Comment b.

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The notion that international concerns have both international and domestic effects is reflected more strongly in the revised *Restatement of Foreign Relations Law of the United States: Tentative Draft No. 1*, submitted to the American Law Institute in June 1980. The revised draft deemphasizes the question of treaty subject matter, simply stating that the United States has constitutional power to make international agreements and that no agreement or any of its provisions may contravene any constitutional provision applicable to any exercise of authority by the Federal government. Id. § 304. A comment adds that the Constitution does not expressly define treaty purpose or subject matter, observing that the Constitution incorporates the international law principles, which similarly recognize no limitations, except that the agreement not conflict with a peremptory norm of international law. The United States may conclude an agreement of "any subject suggested by its national interest in its relations with other nations" so long as the agreement is a "bona fide international act with one or more other nations, not a unilateral act dressed up to look like an agreement." Id. § 304, Comment c. A subsequent Reporters' Note carries the discussion further: "There is no principle either in international law or in American Constitutional Law that some subjects are intrinsically 'domestic' and not permissible subjects for an international agreement." Id. §304, Reporters' Note 2. The note adds that the International Court of Justice has stated that even a subject of expressly domestic concern " 'ceases to be only within the domestic jurisdiction of the State, [and] enters the domain governed by international law,' if states conclude an agreement about it." Ibid., citing *Nationality Decrees in Tunis and Morocco, Great Britain* v. *France*, P.C.I.J., Ser. B, No. 4, at 26 (1923).

The Draft Restatement view appears to incorporate the views of legal commentators who have held, *inter alia*, that statements such as those of Justice Hughes are not meant to imply that treaties dealing with external matters may not simultaneously have an internal aspect. This reading of Hughes remarks has been borne out in practice, as the United States has ratified a number of treaties on matters of foreign relations that simultaneously affect domestic concerns. These include, for example, the 1926 Slavery Convention, the 1912 Convention Relating to the Suppression of the Abuse of Opium and Other Drugs, and the 1949 Road Traffic Convention. Professor Henkin refers to these agreements, in which the United States pledges to treat its inhabitants in a certain way, as "parallel" agreements, an approach that he feels does not defeat the "international concern" requirement. Henkin, "The Constitution, Treaties, and Human Rights," 116 U. Pa. L. Rev. 1012, 1026–27 (1968).

Opponents of the use of the treaty power to conclude human rights conventions generally hold that the State's regulations of relations between it and its citizens, as occurs, for example, when it defines a crime and its punishment, is a matter at the core of domestic jurisdiction. Proponents, who appear to represent the prevailing view, generally argue that international stability and peace, conditions essential to a secure future for the United States, can be achieved only by international protection of human rights. A convention such as the Genocide Convention is an effective means to that end, and it is essential that the United States assume its obligations under it. International minimum standards for human rights have long been a matter of international concern, they maintain. Even though various aspects of the Genocide Convention may deal with domestic matters, the fact that a significant number of nations have ratified the Convention reflects a consensus that these "domestic" matters have become subjects of international concern. Moreover, they argue, because providing sanctions for genocide has an obvious impact on war and peace among nations, it is a matter suitably related to foreign policy to be the subject of a treaty.

ARTICLE II

Article II.—In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Article II sets forth the particular acts which constitute genocide for purposes of the Convention, as well as the state of mind required before an act will fall within the scope of the treaty. Debate surrounding Article II has generally criticized the vagueness of several phrases, in particular, "intent to destroy, in whole or in part, a . . . group as such," and "mental harm." In response to these concerns, the Senate Foreign Relations Committee in past considerations of the Convention has recommended the following understandings to the Senate:

> (1) That the U.S. Government understands and construes the words "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such" appearing in article II to mean the intent to destroy a national, ethnical, racial, or religious group by the acts specified in article II in such a manner as to affect a substantial part of the group concerned.
>
> (2) That the U.S. Government understands and construes the words "mental harm" appearing in article (II)(b) to mean permanent impairment of mental facilities.

These understandings would not act to modify the treaty provisions so as to affect the United States' underlying international obligation, but would seek to clarify or interpret the meaning of that obligation. 14 M. Whiteman, Digest of Int'l L. 137–38 (1970). Thus, the first understanding attempts to explain the meaning of "intent" and emphasize that genocide may not occur without the particular intent described. The element of intent set forth in the treaty provision would presumably prevent dubious charges of genocide, based on, for example, racial and religious discrimination or wartime combat, and distinguish the crime from homocide. Proof of genocide would require a showing of intent to destroy an entire group for the very fact that it is a particular national, ethnical, racial or religious group, and a criminal act "undertaken in a way that would be intended to affect a substantial part of the group." Genocide Convention: Hearings on Exec. O, 81st Cong., 1st Sess., Before the Senate Comm. on Foreign Relations, 95th Cong., 1st Sess. 23 (1977) (testimony of Herbert J. Hansell, Legal Adviser, Department of State) [hereinafter cited as 1977 Hearings]. The Convention's definition of intent has generally been held to make proof of this element difficult. *Id.* 31. The understanding reflects a construction proposed by the Department of State during hearings held in 1950:

> Mr. RUSK. * * *
>
> Genocide, as defined in article II of the convention, consists of the commission of certain specified acts, such as killing or causing serious bodily harm to individuals who are members of a national, ethnical, racial, or religious group, with the intent to destroy that group. The legislative history of article II shows that the United Nations negotiators felt that it should not be necessary that an entire human group be destroyed to constitute the crime of genocide, but rather that genocide meant the partial destruction of such a group with the intent to destroy the entire group concerned.
>
> Senator MCMAHON. That is important. They must have the intent to destroy the entire group.
>
> Mr. RUSK. That is correct.
>
> Senator MCMAHON. In other words, an action level against one or two of a race or religion would not be, as I understand it, the crime of genocide. They must have the intent to go through and kill them all.
>
> Mr. RUSK. That is correct. This convention does not aim at the violent expression of prejudice which is directed against individual members of groups.
>
> Senator LODGE. Is that the difference between genocide and homicide?
>
> Mr. RUSK. That is the principal difference, yes.

[The Genocide Convention: Hearings Before a Subcommittee of the Senate Comm. on Foreign Relations on Exec. O, 81st Cong., 2d Sess. 12 (1950) (testimony of Deputy Under Secretary of State Dean Rusk.)]

The second understanding, discussed with approval by the Department of State witness, Herbert Hansell during the 1977 hearings, describes the degree of mental harm necessary for an act to fall within the scope of the convention. Violent expressions of prejudice against individual group members would be excluded and spurious claims of mental harm discouraged. 1977 Hearings 52 (statement of Bruno V. Bitker, Chairman, Committee on International Human Rights, American Bar Association). Further, the imposition of mental harm must be accompanied by the intent to destroy an entire national, ethnical, racial, or religious group. 1977 Hearings 31 (testimony of Mr. Hansell).

ARTICLE III

Article III.—The following acts shall be punishable:

(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

Article III defines the acts that are punishable as genocide. While these acts have appeared to be generally non-controversial, questions have been raised that the punishment of "direct and public incitement to commit genocide" may encroach on the First Amendment right to freedom of speech. The right to free speech, however, has been held to be subject to some restrictions, namely those "required to protect the State from destruction or from serious injury, political, economic, or moral," *Whitney* v. *California*, 274 U.S. 357, 375–376 (1927) (Brandeis, J. concurring). Thus, like obscenity, libel or slander, and words inciting riots, the direct and public incitement of crime remains unprotected by the constitutional guarantee. Cf. *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942); *Schenck* v. *United States*, 249 U.S. 47 (1919) (denying constitutional protection to words constituting a "clear and present danger").

This principle has been reasserted by the Supreme Court in *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), where the Court reversed a conviction under a criminal syndicalism statute of advocating the necessity or propriety of criminal or terroristic means to achieve political change. The Court reaffirmed that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Id. 447.

It is important to note that the original Secretariat draft of the Genocide Convention included as punishable acts "[a]ll forms of public propaganda tending by their systematic and hateful character to provoke genocide, or . . . make it appear as a necessary, legitimate or excusable act . . . ." Economic and Social Council, Doc. No. E/623, at 14 (Jan. 30, 1948). The drafters eventually removed this provision after the United States made clear that the American legal system prohibits interference with speech unless it creates a "clear and present danger." *Ibid.* Moreover, under Article V of the convention, Parties agree to enact implementing legislation, but only "in accordance with their respective Constitutions." At least one commentator has noted that "[a]s the Convention is now construed no person in the United States could be apprehended for incitement to genocide unless arresting officials met American constitutional free speech tests." Comment, "Genocide: A Commentary on the Convention," 58 Yale L. J. 1143, 1146 (1949). This assessment was reaffirmed in 1970 testimony by then Assistant Attorney General William Rehnquist, who, after an approving reference to *Brandenberg* v. *Ohio*, stated that constitutional free speech protections "would not" and "could not" be affected in any way by the Convention's terms. Genocide Convention: Hearings on Exec. O, 81st Cong., 1st Sess., Before a Subcomm. of the Senate Comm. on Foreign Relations, 91st Cong., 2d Sess. 148 (1970). See also 1977 Hearings 22 (testimony of Mr. Hansell).

ARTICLE IV

Article IV.—Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

This provision makes clear each Contracting Party's obligation to punish persons guilty of committing genocide, whether they be constitutionally responsible rulers, public officers, or private individuals. There appears to be no legal impediment to punishing an individual for acts of genocide. Indeed, long established precedent holds that individuals are capable of committing crimes against international law, whether they are punished in domestic or international courts. See *United States* v. *Smith*, 5 Wheat (18 U.S.) 153 (1820).

Questions regarding Article IV have generally focused on its exclusion of governments from those parties that might be held responsible for genocide, an exclusion apparently based on practical, rather than legal considerations. It has often been noted that genocide, as the organized destruction of a group, would likely be an unsuccessful undertaking without the announced or tacit approval of a government of the country in which it occurred. Because of this almost inevitable State involvement, the absence of governments from Article IV appears to weaken the provision significantly. However, domestic sanctions against governments would seem to be infeasible, as public officials or rulers would be unlikely to subject themselves to punishment. An obligation would appear to remain, however, for successor governments to bring charges against former public officials for acts covered by the Convention. While the Convention does not establish international jurisdiction over States committing genocidal acts, it appears incidentally to recognize State involvement by providing that Parties may call upon the United Nations to take appropriate action under the United Nations Charter to prevent and suppress genocide as defined by the Convention (Art. VIII) and allowing Parties to refer to the International Court of Justice disputes concerning the interpretation, application of fulfillment of the Convention, including those relating to State responsibility (Art. IX).

ARTICLE V

Article V.—The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.

Article V clearly indicates that the Genocide Convention is a non-self-executing agreement, that is, its provisions have no domestic legal effect without implementing legislation. The provision thus comports with the longstanding domestic precedent that a treaty cannot legislate criminal law within the United States, a consequence of the rule that the Federal courts' criminal jurisdiction must be expressly authorized by Congress. *United States v. Hudson & Goodwin*, 7 Cr. (11 U.S.) 32 (1812); *United States* v. *Coolidge*, 1 Wheat. (14 U.S.) 415 (1816). In addition, arguments that the Convention might authorize what the Constitution prohibits appear to be dispelled both by the terms of the Convention itself, which explicitly states that the Parties' implemening legislation be enacted "in accordance with their respective Constitutions," as well as by the ample judicial precedent recognizing the supremacy of the Constitution over a treaty. E.g., *Reid* v. *Covert*, 354 U.S. 1, 16–18 (1957).

It would appear that Congress has the power to enact the envisioned implementing legislation, both pursuant to the Convention and under its enumerated constitutional powers. The former derives from its power, set forth in Article I, § 8, cl. 18, to "make all laws which shall be necessary and proper for carrying into execution . . . all other powers vested by this Constitution in the government of the United States." *Missouri* v. *Holland*, 252 U.S. 416, 432 (1920). Moreover, even absent the Convention, Congress would seemingly be able to enact legislation punishing the crime of genocide, as it is empowered both "to define and punish . . . offenses against the law of nations." U.S. Const. I, § 8, cl. 10.

Under previous Administrations, the Department of State recommended to the President that the United States instrument of ratification not be deposited until implementing legislation has been enacted. This was incorporated in the proposed resolution of ratification, reading as follows:

"That the United States Government declares that it will not deposit its instrument of ratification unit after the implementing legislation referred to in Article V has been enacted."

Senate approval of the Convention would thus be the first in a two-step process of ratification. Implementing legislation was originally introduced in the 92d Congress (S. 3182 and H.R. 13185) and reintroduced in the three succeeding Congresses, with S. 2105 and H.R. 7986, 95th Cong.; 1st Sess. (1977), the most recent. These bills would have added a new chapter 50A to Title 18 of the United States Code, defining the crime of genocide, setting forth criminal penalties, prescribing intent as a separate element of the crime charged, and as well as providing that the remedies set forth in the Act are exclusive but not intended to occupy any State or local laws on the same subject matter, or invalidate any State law unless it is inconsistent with the purposes of the Act or its provisions. In addition, the legislation would have expressed the sense of Congress that in the negotiation of extradition treaties the United States shall reserve its right to refuse extradition of a United States national to a foreign country for a genocide offense, when that offense has been committed outside the United States and where the United States is competent to prosecute and intends to do so or where the person whose surrender is sought has been or is being prosecuted.

ARTICLE VI

Article VI.—Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which still have accepted its jurisdiction.

Article VI has engendered debate on the ground that it does not expressly state that the courts of the country where the accused has citizenship can exercise jurisdiction over the crime of genocide. It is well established that a nation has jurisdiction to prescribe rules of law regarding conduct within its territory as well as regarding the conduct of one of its nationals wherever the conduct occurs. *Restatement (Second) of the Foreign Relations Law of the United States* §§ 17, 30 (1965). Thus, there are a number of Federal statutes containing criminal sanctions that have extraterritorial application. These cover such matters as fraud and misuse of visas, permits, and other entry documents, 18 U.S.C. § 1546, the transportation of stolen goods, securities, moneys, fraudulent state stamps, or articles used in counterfeiting, 18 U.S.C. § 2314, treason committed "within the United States or elsewhere," 18 U.S.C. § 2381, securities offenses, 15 U.S.C. §§ 776 *et seq.*, antitrust violations, 15 U.S.C. §§ 1–7 *et seq.*, and labeling offenses prescribed by the Federal Trade Commission Act, 15 U.S.C. §§ 686 *et seq.*

Concerns that the United States would be unable to try its own citizens for crimes of genocide under the Convention would appear to be allayed by both the convention's negotiating history and the proposed understanding to be attached to the agreement. While the United Nations Secretariat draft would have allowed Parties to punish genocide "irrespective . . . of the place where the offense has been committed," Economic and Social Council, Doc. No. E/623, at 16 (Jan. 30, 1948), the 1948 report of the Legal Committee of the United Nations General Assembly indicates that the more limited provision eventually adopted is seemingly not intended to prevent a State from bringing its own nationals to trial for conduct taking place outside its territory:

"At its 131st meeting, the Committee had agreed to insert in its report to the General Assembly the substance of an amendment to Article VI submitted by the representative of India, according to which nothing in the article should affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State. Following this, the representative of Sweden had requested that the report should also indicate that Article VI did not deprive a State of jurisdiction in the case of crimes committed against its nationals outside national territory. After some discussion of the questions raised in this connexion, the Committee, at its 134th meeting, adopted, by 20 votes to 8, with 6 abstentions, an explanatory text for insertion in the present report. Report of the Sixth Committee; U.N. Doc. A/760 and Corr. 2 (Dec. 3, 1948)."

The explanatory text referred to by the Committee reads as follows:

"The first part of Article VI contemplates the obligation of the State in whose territory acts of genocide have been committed. Thus, in particular, it does not affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State."

To make clear that the obligation of a State to punish genocidal acts committed within its territory does not affect the concurrent right of any other State Party to punish its own nationals for conduct wherever committed, the Senate Committee on Foreign Relations has recommended since its consideration of the Convention in 1950 the following understanding:

"That the U.S. Government understands and construes article VI of the convention in accordance with the agreed language of the report of the Legal Committee of the United Nations General Assembly that nothing in article VI shall affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State."

Article VI also provides that persons charged with genocide may also be tried by any international penal tribunal that may have jurisdiction "with respect to those Contracting Parties which shall have accepted its jurisdiction." The provision appears to have little practical effect as no international penal tribunal has yet been established and the International Court of Justice has no penal or criminal jurisdiction. In addition, the provision acknowledges only the possible future jurisdiction of an international criminal court, and, some hold, unlike the International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068. (XXVIII), 30 November 1973, does not appear directly to envision the establishment of such a tribunal. Bassiouni & Derby, Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments, 9 Hofstra L. Rev. 523, 571 (1981) [hereinafter cited as Bassiouni & Derby]. The United Nations Committee on International Criminal Jurisdiction prepared a Draft Statute for an International Criminal Court in 1951, U.N. Doc. No. A/AC.48/4 (Sept. 5, 1951), and issued a revised proposal in 1953, U.N. Doc. A/2645 (1954). Several other draft statutes have been proposed in recent years, Bassiouni & Derby 576–577, but there have been no active plans for the establishment of such a criminal tribunal. However, pursuant to the Apartheid Convention and a subsequent General Assembly Resolution, G.A. Res. 34/24, ann. 1, para. 20 (Nov. 15, 1979), a Draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and Other International Crimes has been proposed, providing for Supplemental Agreements that would permit the tribunal to investigate, prosecute, adjusticate, and punish additional international offenses. Bassiouni & Derby 547–571. In any event, it does not seem that ratification of the Genocide Convention obliges the Parties to enter into any further treaties to establish the envisioned criminal court. Comment, "Genocide: A Commentary on the Convention," 58 Yale L.J. 1149–50, n. 59, citing 95 Cong. Rec. App. A1270, A1271 (1949) (remarks of Mr. Lemkin); 1977 Hearings 23 (testimony of Mr. Hansell). Were the United States to contemplate such an action, it would appear that precedent may be found to support United States' participation in establishing an international court whose jurisdiction extends over subjects of international negotiation. McDougal & Arens, "The Genocide Convention and the Constitution," 3 Vanderbilt L. Rev. 683, 694–705 (1950); see generally, Henkin, Foreign Affairs & the Constitution 196–201 (1972).

ARTICLE VII

Article VII.—Genocide and the other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article VII appears to have no immediate effect on United States extradition law and practices. The Article contemplates that new or revised extradition treaties include genocide as an extraditable offense, but does not appear to require such inclusion. Where the crime is included, however, the Convention provides that the political crime defense should be made unavailable.

There is currently no United States statute or extradition treaty that covers genocide. In accordance with international law, the United States will not extradite fugitive criminals apart from a treaty. *Factor* v. *Laubenheimer*, 290 U.S. 276, 287 (1933). In this regard, the Supreme Court has held that "in the absence of a conventional or legislative provision, there is no authority vested in any department of the government to seize a fugitive criminal and surrender him to a foreign power." *Valentine v. United States ex. rel. Neidecker*, 299 U.S. 5, 9 (1936), quoting *Moore on Extradition*. Where the United States has entered into an extradition treaty, domestic law authorizes the surrender of persons who have committed crimes in foreign countries, following specified legal proceedings within the United States. 18 U.S.C. §§ 3181 *et seq.*

While the Convention does not act as an extradition treaty, it does appear to pledge the United States not to treat genocide as a political offense when this nation negotiates a new extradition treaty or revises an existing one. Although all United States extradition treaties now in force expressly prohibit the extradition of persons charged with offenses of a political nature, the Convention does not appear to alter this nation's existing treaty practice. Political crimes generally consist of two types: (1) offenses such as treason, sedition and espionage, which are committed exclusively against the State, and (2) offenses against individuals, which have a political element. 2 Bassiouni & Nanda, A Treatise on International Criminal Law 363 (1973). United States courts have traditionally treated the latter under principles established in the English case, In re Castioni, 1 Q.B. 149 (1890), where such offenses were found not to be extraditable if they were "incidental to and formed part of political disturbances." Id. 166 It is unlikely that a court would consider genocide, as the planned destruction of a group, to fall under either category of political offense, so that United States adherence to a treaty that does not recognize a political offense exception for genocidal acts appears to be consistent with current United States practice.

There has been some concern that the Convention would require the United States to extradite its citizens to foreign nations for trial on charges of genocide, with the possibility that the accused's constitutional rights would be disregarded in an alien legal system. The Department of State has made clear that United States practice has been not to negotiate extradition treaties with nations that do not permit defendants a fair trial. It has stated that "the possibility of a fair trial, even though the standards cannot be expected to match ours in every detail, is always a factor taken into account in deciding whether to negotiate an extradition treaty." 1977 Hearings 27 (statement of Mr. Hansell). Current extradition treaties generally provide that before the United States will grant extradition, the requesting state must provide evidence sufficient to persuade a United States court and the Executive branch that the accused would also be held for trial in the United States had the alleged crime been committed in this country. They also provide that extradition is not available if the accused has been or is on trial in the United States for the crime at issue. In addition, the negotiating history of Article VII indicates that the Convention is not intended to affect the right of a Party to try one of its own nationals for acts committed outside of its territory. Further expression of the right of the United States to try its own nationals and refuse extradition is found in the proposed implementing legislation:

SEC. 3. It is the sense of the Congress that the Secretary of State in negotiating extradition treaties or conventions shall reserve for the United States the right to refuse extradition of a United States national to a foreign country for an offense defined in chapter 50A of title 18, United States Code, when the offense has been committed outside the United States, and

(a) where the United States is competent to prosecute the person whose surrender is sought, and intends to exercise its jurisdiction, or

(b) where the person whose surrender is sought has already been or is at the time of the request being prosecuted for such offense.

ARTICLE VIII

Article VIII.—Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United States as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.

Article VIII establishes a role for the United Nations in the prevention and suppression of genocidal acts. It would not appear that the Article enlarges the scope of United Nations' business, as genocide, when viewed as broad-scaled mass murder, would arguably either violate the U.N. Charter's human rights provisions or threaten world peace. Article I(1) of the Charter sets forth the maintenance of international peace and security as one of the organization's purposes.

The Article requires that the petitioned actions be taken under the Charter, which expressly provides that the latter neither authorizes the U.N. to intervene in matters that are essentially within the domestic jurisdiction of any State nor requires U.N. Members to submit such matters to settlement under the Charter. Art. 2(7). It would appear that in practice the U.N.'s role in enforcing the Convention would likely be limited to one of exerting moral pressure. Actions in the General Assembly or the Economic and Social Council would of necessity take the form of discussions, studies, and recommendations. U.N. Charter, Arts. 10, 62. While the Security Council would be empowered to authorize military force against a Party if the genocidal acts were found to threaten world peace, U.N. Charter, Chap. VII, Arts. 39, 41, 42, whether the Council would use this power is speculative at best. More probable might be the imposition of diplomatic or economic pressures, such as, the Council's 1966 and 1968 economic sanctions against Zimbabwe-Rhodesia, an example of the Council's use of Chapter VI non-military sanctions on human rights grounds.

ARTICLE IX

Article IX.—Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Article IX, extending the contentious, or adversary, jurisdiction of the International Court of Justice in disputes concerning the interpretation, application, or fulfillment of the Convention, including those relating to State responsibility for genocide, exemplifies a "compromissary clause," a type of provision found in many multilateral and bilateral agreements to which the United States is a party. See, e.g., lists in Convention on Offenses Committed on Board Aircraft, S. Exec. Rep. No. 3, 91st Cong., 1st Sess. 24-26 (1969) [hereinafter cited as Report on Hijacking Convention]. Use of the compromissary clause procedure would presumably invoke the Court's jurisdiction under Article 36(1) of its organizing Statute, which provides that "[t]he jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."

Some have expressed concern that Article IX would invalidate the Connally Amendment, which provides that United States adherence to the so-called optional clause of the I.C.J. Statute conferring compulsory jurisdiction on the Court, Art. 36(2), is subject to the condition that the Court's compulsory jurisdiction not extend to "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America *as determined by the United States*." 61 Stat. 1218 (1946) (emphasis added). Because the Connally Amendment is appended to United States acceptance of compulsory I.C.J. jurisdiction under Article 36(2) of the Court's Statute, it is generally held that the amendment would not be affected by (nor would it defeat) U.S. agreement to the type of dispute settlement procedure articulated in Article XI. *E.g.*, 1977 Hearings 32–34 (testimony on Mr. Hansell); Goldberg & Gardner, "Time to Act on the Genocide Convention," 58 A.B.A.J. 141 (1972).

The relationship of the Connally Amendment to compromissary clauses was considered by the Senate during hearings held in 1960 on several maritime treaties. Convention on the Law of the Sea: Hearings on Exec. J–N, 86th Cong., 2d Sess., Before the Senate Comm. on Foreign Relations, 86th Cong., 2d Sess. (1960) [hereinafter cited as Hearings on Sea Law Conventions]; International Convention for the Prevention of Pollution of the Seas by Oil: Hearings on Exec. C, 86th Cong., 2d Sess., Before the Senate Comm. on Foreign Relations, 86th Cong., 2d Sess. (1960) [hereinafter cited as Oil Pollution Convention Hearings]. Appended to four conventions produced by the first United Nations Conference on the Law of the Sea was an Optional Protocol providing for compulsory I.C.J. jurisdiction in disputes between the parties arising out of the interpretation or application of any of these conventions—a typical compromissary clause. In response to questions posed by the Senate Committee on Foreign Relations, Arthur Dean, Special Consultant to the Department of State and the Department's spokesman before the Senate, stated that the protocol was theoretically inconsistent with the Connally Amendment because it would contain no reservation such as that contained in the Amendment "unless . . . the Senate chose to put it in." Hearings on Sea Law Conventions 76. This inconsistency, however, would have no legal effect. As explained by the State Department:

"The United States, in accepting the optional protocol concerning the compulsory settlement of disputes, would be agreeing vis-a-vis any other state accepting this protocol to the submission to the International Court of Justice of any disputes arising out of the interpretation of operation of any of the four conventions for a binding decision by that Court. Such submission would not be subject to the Connally Reservation attached to the United States declaration accepting generally the compulsory jurisdiction of the Court. Id. 88–89." [1]

The same Connally Amendment question arose again during Senate consideration of the International Convention for the Prevention of Pollution of the Sea by Oil, signed May 12, 1954, which also contained a compromissary clause providing for submission of disputes to the I.C.J. In a memorandum for the Foreign Relations Committee, the State Department's Legal Adviser discussed, among other things, the source of I.C.J. jurisdiction in cases brought under Article XIII, the clause in question. The Article, he explained, "is a specific provision in a treaty permitting the parties to refer certain matters for determination by the International Court of Justice. The jurisdiction of the Court in such cases is provided in article 36, paragraph 1, of the statute of that Court. In my opinion, a submission to the Court under this specific provision would not be subject to the Connally reservation attached to the U.S. declaration accepting generally the compulsory jurisdiction of the Court. That declaration was filed pursuant to article 36, paragraph 2, of that statute of the Court. The specific provision of Article XIII would govern references to the Court made under it. The Connally reservation would only apply to references where jurisdiction is premised on the declaration of general acceptance of jurisdiction. Hearings on Oil Pollution Convention 14–15."

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[1] While the Committee on Foreign Relations favorably reported both the treaties and the protocol and the full Senate consented to ratification of all five documents, the protocol was later defeated on reconsideration.

In reporting the Convention, the Senate Foreign Relations Committee stated that it was aware that the Connally Amendment would not apply to disputes referred to the I.C.J. under the Convention, noting that "[a]s a practical matter it is hardly conceivable that any matter arising under this convention, pertaining as it does to oil pollution of the high seas by ships, could be construed as being within the domestic jurisdiction of the United States." S. Exec. Rep. No. 6, 86th Cong., 2d Sess. 8 (1960). The Convention, without reservation to Article XIII, was ratified by the Senate in 1961.

While the Senate's speculation on the practical effect of Article XIII is arguably less relevant to a convention having the crime of genocide as its subject matter, the history of the sea law and oil pollution treaties in the Senate does indicate some agreement by the public participants in the ratification process on the effect of the Connally Amendment on compromissary clauses generally. There is accord, it would seem, on the proposition that the Amendment has no effect on submitting disputes to the I.C.J. under compromissary clauses of "specific" treaties unless clauses are qualified with a clear statement making a "self-judging domestic-jurisdiction" reservation applicable. Bishop & Myers, "Unwarranted Extension of Connally Amendment Thinking," 55 Am J. Int'l L. 135, 140 (1961). As some have observed:

"Whatever may be one's views as to the desirability or undesirability of the Connally Amendment as a limit upon general acceptance of the Court's jurisdiction under Article 36, paragraph 2, there seems no sufficient reason to impose a similar restriction on the narrower acceptance of compulsory jurisdiction as to controversies between parties to a particular treaty when disputes concern interpretation or application of that treaty. This distinction between the broad general acceptance of compulsory jurisdiction over a wide range of international law questions, and the specific narrow acceptance of jurisdiction in the compromissary clauses, lies at the heart of the effort to include these clauses in our treaties. Id. 141."

A compromissary clause may well be a means of indicating that the United States has determined that certain issues, i.e., those arising under a specific treaty, are not solely matters of domestic jurisdiction. Concerns that the Convention deals with a criminal matter, a subject that by its nature falls within domestic jurisdiction, may lead to an argument that the language of Article IX would deprive the United States of Connally Amendment protections were the Supreme Court to determine that a matter lay within such domestic jurisdiction. Any such determination would presumably involve a determination of the validity of the treaty itself, that is whether the treaty power has been used, improperly, to make domestic law within the United States. Admittedly, if the treaty power were held invalid by the Supreme Court, the United States, in the absence of a Connally-type reservation to Article IX, would seem potentially subject to adverse claims before the I.C.J. by other States Parties. Such claims could be based upon the continuing international obligations of the United States under the Convention, not withstanding any contrary requirements mandated by United States domestic law. See *Restatement (Second) of the Foreign Relations Law of the United States* § 145(2), Comment c (1965); *Whitney* v. *Robertson*, 124 U.S. 190 (1888); *Advisory Opinion on Treatment of Polish Nationals in Danzig, P.C.I.J.*, ser. A/B, No. 44 at 22 (1932). However, whether the United States Supreme Court would hold the treaty invalid for lack of "international concern" seems doubtful in view of the extensive State adherence to the Convention and the widely-held view that human rights, as enjoyed domestically, is a proper subject for international agreement.

Finally, numerous treaty parties, most notably Communist bloc countries, have ratified the Convention subject to the reservation that they do not consider themselves bound by Article IX. Were the United States to take exception to this practice, as a number of parties have already done, it would be able to invoke the reservation in its own favor in cases brought before the I.C.J. by the reserving states. 1977 Hearings 42 (written responses of Mr. Hansell to additional Committee questions).

[Annex 2]

PROXMIRE REFUTES ARGUMENTS OF LIBERTY LOBBY WHITE PAPER

In October 1981 the Liberty Lobby organization issued its White Paper on The Genocide Convention.

Following its release, I made a number of speeches refuting the arguments contained in that White Paper.

The text of those speeches follow:

[From the Congressional Record, Oct. 19, 1981]

GENOCIDE CONVENTION DOES NOT REQUIRE EXTRADITION

Mr. PROXMIRE. Mr. President, when I first began to make my daily speeches urging Senate ratification of the Genocide Convention, I did not imagine that 14 years later it would be necessary to refute the identical charges initially leveled against this worthy document.

For over 30 years the Senate has withheld approval from a convention which represents a noble and worthwhile principle. Although refuted on innumerable occasions, the objections to the treaty still persists. The latest attempt to refute the worthiness of the Genocide Convention comes from the "White Paper on the Genocide Convention," a document distributed by the Liberty Lobby.

Among the old criticisms which once again appear in this paper is the allegation that, if ratified, the Genocide Convention will allow the extradition of American citizens for trial by an international court. This, the article points out, would jeopardize the constitutional rights of any American who was actually extradited.

The simple fact is that there is no provision for extradition within the Genocide Convention. Ratification of the treaty would not affect existing extradition treaties to which the United States is a party. As stated in the understanding accompanying the treaty:

"Nothing in Article VI shall affect the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside the State."

No international tribunal capable of prosecuting any American or other individual exists at the present time. Any future international court would be created only as the result of a new treaty. Both the ratification of such a treaty, and American acceptance of its jurisdiction would require Senate consent. It is inconceivable that the U.S. Senate would approve of the creation of an institution which might jeopardize the rights of American citizens.

The objections to the Genocide Convention are not based on a true appraisal of the meaning of the document itself. Yet, for over 14 years, I have watched with increasing unhappiness as these same issues are constantly reinvoked. It is time to finally lay these criticisms to rest permanently, and to ratify the Genocide Convention.

The Genocide Convention is nothing more than an attempt to extend international protection of human rights in a more concrete and meaningful way. Over 80 nations have already ratified this convention. The United States is overdue in its ratification of this meaningful document.

[From the Congressional Record, Oct. 21, 1981]

GENOCIDE TREATY DOES NOT ACCEPT POLITICAL MURDERS

Mr. PROXMIRE. Mr. President, today I would like to once again refer to allegations made in the recent "White Paper on the Genocide Convention," a document distributed by the Liberty Lobby. The criticisms which have been leveled at the treaty since 1949, and which appear once again in this document, consistently point to supposed loopholes and shortcomings of the treaty.

It is my belief that those who oppose ratification of the Genocide Convention do not understand either the meaning of the treaty nor its underlying principles.

Under the heading "Political Mass Murder Accepted," the Liberty Lobby's white paper essentially makes the assumption that by the noninclusion of political groups as potential genocide victims within the treaty, this form of mass murder is therefore made acceptable.

The white paper then makes the argument that on the basis of this and similar alleged weaknesses, the Genocide Treaty should not be ratified.

In the first place, to believe that the omission of political groups from the treaty's definition of genocide is equal to the approval of the commission of genocide against such groups is an exercise in misguided logic.

Any international agreement is enormously difficult to negotiate; it is imperative to build a foundation upon which all parties may agree. The definition of a particular crime in a treaty does not perpetually exclude other acts not originally covered.

Later negotiations may well expand the scope of the original treaty. Does the limitation in scope of one aspect of the treaty warrant the denial of protection to the other groups which are protected by the Genocide Convention? Absolutely not.

Second, the implication of the White Paper that the omission of "political groups" permits the Soviet Union or any Communist or non-Communist state to reclassify any group of citizens as a "political group" and then freely commit mass murder is ludicrous.

It is clear that attempts to destroy members of an ethnic, racial, religious or national group, in whole or in part, constitute genocide. The public relations efforts of such murderous henchmen do not excuse or permit such unconscionable acts under the treaty.

Third, a point that friends and foes alike should heed is that this convention would apply to Communist and non-Communist nations alike. And I want to make it absolutely clear that this Senator intends to speak out loud and clear regarding any Communist transgressions of the spirit or letter of this convention.

Mr. President, the Genocide Convention stands as an affirmation of human rights, and a movement toward international protection of human life. Ratification of the treaty would enhance the position of the United States as a leader in the cause of human rights.

Certainly, ratification would aid in the credibility and overall strength of international law.

The treaty is not a plot by Communist sympathizers or bleeding hearts, nor is it an attempt to abridge the constitutional rights of Americans by allowing indiscriminate extraditions and international trials. No treaty—and I mean none—can override any constitutional rights of Americans.

Those who would seek to invalidate the benefits of the treaty by engaging in these ill-conceived exercises in sophistry must not prevent ratification of the Genocide Convention any longer. The United States must ratify the Genocide Convention.

[From the Congressional Record, Oct. 22, 1981]

GENOCIDE CONVENTION WOULD STRENGTHEN AMERICA'S EFFORTS TO PROTEST SOVIET ABUSES

Mr. **PROXMIRE**. Mr. President, the "Liberty Lobby's White Paper" on the Genocide Convention makes the following assertion and I quote:

"It is clear that the ratification of the Genocide Convention will in no way serve the interests of the United States nor those of the citizens, voters and taxpayers. The only argument for it reduces to infinitely repeated assertions that it will somehow aid our 'foreign policy'—an elusive thing which itself has never been defined."

Mr. President, statements such as this one could not be further from the truth. The only thing that is clear from reading this White Paper is that the Liberty Lobby needs only to read the hearing record of the Foreign Relations Committee to determine how this treaty will serve the interests of the United States, its citizens, voters and taxpayers.

The benefits to our foreign policy are more than elusive, undefined ideas.

First, ratificatiion of the Genocide Convention would strengthen our hand in attacking the gross violation of human rights by the Soviet Union and its allies. While the Genocide Convention itself is a narrowly drafted human rights treaty, the testimony of Nixon administration officials during the 1970 hearing make it clear that ratification of this convention would strengthen our foreign policy.

Rita Hauser, a Republican respected on both sides of the aisle, and, at the time, our delegate to the Human Rights Commission, testified:

"We have frequently invoked the terms of this convention (the Genocide Convention) as well as the provisions of the Universal Declaration of Human Rights . . . in our continued aggressive attack against the Soviet Union for its practices, particularly as to its large Jewish communities but also as to its Ukrainians, Tartars, Baptists and others. It is this anomaly . . . that while we have felt free to invoke the Genocide Convention against others, we have not yet ourselves ratified it. This often leads to the retort in debates plainly put, simply put, 'Who are you to invoke a treaty that you are not party to?' "

Who indeed, Mr. President? In that same hearing, Ambassador Charles Yost, a career foreign service officer, and President Nixon's choice to represent the United States at the United Nations, noted:

"I can assure the subcommittee that in my diplomatic life, at the United Nations and elsewhere, no question has ever been asked me about the policy of my country which has been more difficult to answer than questions about American inaction on this convention."

But that was 1970, Mr. President. Does our failure to ratify this convention impair our ability to conduct our foreign policy? Does it impair our ability to speak out against abuses by the Soviet Union and its allies today? Absolutely.

Former Associate Supreme Court Justice Arthur Goldberg, who represented the United States at the United Nations for 3 years, pleaded with the Foreign Relations Committee in the 1977 hearings not to send our people to Belgrade, for the "Helsinki Accord Conference" the fall of that year, and talk about human rights when our country still has not ratified the most basic human rights convention—the Genocide Convention.

That Belgrade conference, Mr. President, included a major effort by the Western powers to hold the feet of the Soviet Union and the Eastern European nations to the fire on the basic human rights issues. Our representatives to this and subsequent conferences have repeatedly stated that our hand would have been strengthened in protesting Communist transgressions on basic human rights if the Senate had acted on the Genocide Convention.

Does the Liberty Lobby believe that we should continue to have our diplomats fight the Soviets—and other human rights transgressors—with one arm tied behind their back? I would hope not.

Second, the ratification of this convention eliminates a point of attack for our enemies. As a self-proclaimed leader in the area of human rights—and Mr. President, our record is clearly unequalled in the world—the United States has been haunted by its failure to take action on basic human rights treaties, which parallel our ideals and our practice here at home. It is time to end, for once and for all, these taunts of hypocrisy from nations who wish us ill. It's time to eliminate the puzzlement of our allies, who have ratified this Convention, and are amazed at our procrastination.

Third, ratification of the Genocide Convention would help to accelerate the development of a firm principle of international law that life is sacred. That the world cherishes and will solemnly pledge to safeguard the right of every national, ethnic, racial or religious group to exist. Perhaps this is what Liberty Lobby finds elusive. Perhaps they oppose all international law.

But this Senator is one American, who is proud of our country, proud of the freedoms enumerated in our Declaration of Independence and guaranteed by our Bill of Rights and Constitution, and I do not fear seeing the most basic right that these documents protest—the right to live—protected on an international scale.

Mr. President, we have led the way in the protection of every citizen's liberties here at home. I have enough faith in those principles to see them extended abroad. I would have thought that any organization named Liberty Lobby would have that same faith in the principles we pioneered to see them extended abroad. But I remain hopeful that they will—some day.

[From the Congressional Record, Oct. 23, 1981]

THE GENOCIDE CONVENTION AND THE WORLD COURT

Mr. PROXMIRE. Mr. President, the Liberty Lobby's White Paper on the Genocide Convention alleges that:

"Ratification of the Genocide Convention would have the unfortunate but certain side-effect of repealing the Connally Reservation, six key words inserted into the resolution accepting the jurisdiction of the World Court in 1946. . . . Without them, the World Court would make its own determination of what is to be deemed domestic and foreign matters, subjecting American citizens to the jurisdiction of aliens."

Mr. President, I can well understand how any American who is not an expert in international law would find such an allegation frightening. Unfortunately, the allegation represents a lack of understanding of the treaty, a lack of understanding of the "Connally Reservation" and an abysmal lack of knowledge of existing United States treaty practice.

WHAT DOES THE GENOCIDE CONVENTION SAY?

Mr. President, first, let me turn to the actual wording of the Genocide Convention.

Article IX of the Genocide Convention provides that:

"Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the disputes."

Does this mean that another nation can haul Americans before the World Court or any foreign court? Absolutely not.

The language refers to disputes "between the Contracting Parties". In plain English that means disputes between nations which have signed and ratified the Genocide Convention. Not foreign nations and U.S. citizens.

In addition, the understanding recommended by the Foreign Relations Committee makes it clear that the United States reserves the right to see that all Americans—all Americans—charged with genocide are tried before American courts with every constitutional guarantee, and the proposed implementing legislation directs the Secretary of State to see that any extradition treaties that we consider in the future say just that.

THE UNITED STATES AND THE WORLD COURT

But that is just the beginning, Mr. President. You may ask "C'mon, Proxmire, that article may not result in Americans going before foreign Courts but it certainly violates our sovereignty by letting the World Court meddle in our affairs."

That is a fair question, Mr. President, but let us look at the record.

During the Foreign Relations Committee hearings on the Genocide Convention in 1970, the committee examined this question very carefully. And what did they find?

They found that language providing for the referral of disputes to the World Court—the language of article IX to which the Liberty Lobby objects—was already contained in 27 multilateral treaties, 2 bilateral treaties and 19 commercial treaties.

That is 48 treaties, Mr. President, which are on the books in which the United States has agreed to referral of disputes to the World Court.

Has this diminished our sovereignty in any way. Of course not.

Has the Liberty Lobby or any other group been able to cite one case, just one, in which this language has hurt U.S. sovereignty in any way? Absolutely not.

This record is important, Mr. President, because it clearly demonstrates that this language providing for referrals of treaty disputes to the World Court is accepted American practice, ratified time and again, by the Senate and it has never hurt American interests.

For that reason, Mr. President, I ask unanimous consent that a list of these treaties be reprinted in the Record at the conclusion of my remarks.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered. (See exhibit 1).

"RECIPROCITY"—A SAFEGUARD AGAINST COMMUNIST TREACHERY

Mr. PROXMIRE. But perhaps genocide is different. Mr. President. Even though the record is clear that the language providing for the referral of disputes to the World Court has never harmed American interests, it is fair to ask whether unfounded allegations of American genocide might permit the Soviet Union and its allies an attempt to embarrass the United States.

The answer is loud and clear: No way.

No Communist state can ever haul the United States before the World Court on charges of genocide. Why? Because of the principle of "reciprocity."

What the Liberty Lobby's white paper conveniently omits is the principle of reciprocity. This is a solid principle of international law which states that if any nation—in this case, the Soviet Union and its allies—ratifies any convention with a reservation, we have the right to use that reservation against them in any dispute we have with them.

The Soviet Union and its allies have all ratified the Genocide Convention with a reservation stating that they will decide for themselves what cases they will permit to go to the World Court. While the Liberty Lobby is all too quick to praise the willingness of Soviet diplomats and degrade our own American diplomats, they have missed the significance of this Communist action. By establishing that reservation, the Communist nations have automatically provided us with the right to invoke the Communist reservation in any attempt they might make to bring the United States before the World Court under this treaty. The Communist diplomats have outsmarted themselves and have tied their own hands in any attempt to embarrass America.

Mr. President, it is time for groups such as Liberty Lobby to stop giving Communist diplomats credit where it is not deserved.

THE CONNALLY RESERVATION

Mr. President, I have attempted to show that first, the language of this Convention is language which the U.S. Senate has approved in at least 48 treaties; second, that there has never been a case cited in which this language has harmed U.S. sovereignty or security in any way; and third, that the reservation invoked by the Soviet Union and its allies have given us the very weapon, through the doctrine of reciprocity, to prevent Communist nations from attempting political grandstanding against us.

Finally, I would like to turn to the Connally reservation, which was my starting point for this discussion.

When the statute for the World Court was drafted, it contained two ways in which cases could come before the Court.

The first is contained in article 36(1) of the Court's statute and it provides for the World Court to decide "all cases which the Parties refer to it and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force".

That is precisely the case which applies to the Genocide Convention.

The second way that cases can come to the Court is under article 36(2) of its statute—the so-called compulsory jurisdiction statute. In effect, this article provides that a nation may accept the jurisdiction of the court as compulsory "in relation to any other state accepting the same obligation" in all legal disputes concerning interpretation of a treaty, a question of international law, breaches of international obligations and reparations for a breach of international obligations.

In giving its advice and consent to that second paragraph of article 36, the Senate provided that compulsory jurisdiction of the Court—the four cases I have just cited—would not apply to matters within the United States' domestic jurisdiction—and here are the six words of the amendment offered by Senator Tom Connally—"as determined by the United States."

There are two points that I want to emphasize here, Mr. President.

First, the reason that the Genocide Convention falls under article 36(1) is that the Genocide Convention specifically provides for referral of international disputes to the World Court and that is exactly the case we have here. Article 36(2) to which the Connally reservation applies refers to interpretation of international treaties for which no mechanism of interpretation is provided.

Therefore, the mere mention of the Connally reservation is entirely misleading and that is a conclusion shared by the State Department in their testimony as well as our own Foreign Relations Committee in their reports on the Genocide Convention.

It is their considered opinion, shared by the overwhelming majority of international law scholars, that allegations such as the one Liberty Lobby is making is mixing apples and oranges.

Second, as I have demonstrated earlier, this langauge providing for the referral of disputes to the World Court has been used time and again without undermining our sovereignty one iota.

IN CONCLUSION

Mr. President, the Genocide Convention is a treaty which seeks to extend to other nations a fundamental principle which is as American as apple pie: the right to live. The dignity of man is the guiding inspiration of all of our great American documents—the Declaration of Independence, the Constitution, the Bill of Rights—and it is a principle I am not afraid to share with the world.

For far too long, organizations such as Liberty Lobby has misled Americans by telling them of the great wisdom of the Soviet diplomats and their supporters, but, as I have clearly shown with the principle of reciprocity, here is one case where the Communists have hoisted themselves on their own petard. Why is there not one word about that in the Liberty Lobby White Paper? Not one word. All we read is how Americans are fools easily duped. I have greater faith than that in the American people and know that they will not long be misled by sophistry when the facts are made available to them on how this treaty is in their interest.

Mr. President, I yield the floor.

"EXHIBIT 1

"TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES CONTAINING PROVISIONS FOR SUBMISSION OF DISPUTES TO THE INTERNATIONAL COURT OF JUSTICE, AS OF MAY 22, 1970

"I. MULTILATERAL

"Protocol on military obligations in certain cases of double nationality, concluded at The Hague, April 12, 1930: 50 Stat. 1317; TS 913.[1]

"Convention for limiting the manufacture and regulation of narcotic drugs, concluded at Geneva, July 13, 1931: 48 Stat. 1543; TS 863.[1]

"Convention on international civil aviation (ICAO), opened for signature at Chicago December 7, 1944: 61 Stat. 1180; TIAS 1591.[2]

"Constitution of the Food and Agriculture Organization of the United Nations (FAO), signed at Quebec October 16, 1945 as amended (1950): 60 Stat. 1886; TIAS 1554, 12 UST 980; TIAS 4803.

"Constitution of the United Nations Educational, Scientific, and Cultural Organization (UNESCO), concluded at London November 16, 1945: 61 Stat. 2495; TIAS 1580.

"Convention on the Privileges and Immunities of the United Nations, dated February 13, 1946: 1 UNTS 16.

"Constitution of the World Health Organization (WHO), opened for signature at New York July 22, 1946: 62 Stat. (3) 2679; TIAS 1868.

"Instrument for the amendment of the constitution of the International Labor Organization (ILO), dated at Montreal October 9, 1946: 62 Stat. 3485; TIAS 1868.

"Convention on Road Traffic, dated at Geneva September 19, 1949: 3 UST 3008; TIAS 2487.

"International Sanitary Regulations (WHO Regulations No. 2), adopted by the Fourth World Assembly at Geneva May 25, 1951: 7 UST 2255; TIAS 3625.

"Treaty of Peace with Japan, signed at San Francisco September 8, 1951: 3 UST 3169; TIAS 2490.

"Universal copyright convention, dated at Geneva September 6, 1952: 6 UST 2731; TIAS 3324.

"Constitution of the Intergovernmental Committee for European Migration (ICEM): 6 UST 603; TIAS 3197.

"Protocol amending the slavery convention of September 25, 1926 (46 Stat. 2183: TS 778), opened for signature at New York December 7, 1953: UST 479; TIAS 3532.

"Protocol limiting and regulating the cultivation of the poppy plant and the production of, and international and wholesale trade in, and use of opium, open for signature at New York from June 23 to December 31, 1953: 14 UST 10; TIAS 5273.

"International convention for the prevention of pollution of the sea by oil, signed at London May 12, 1954: 12 UST 2989; TIAS 4900.

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[1] By reference to the PCIJ. (References to the ICJ in place of the PCIJ in these cases is provided for by Article 37 of the Statute of the ICJ.)

[2] Appeals procedure from decision of the Council permits reference to the PCIJ (ICJ) if parties to dispute have accepted the Statute of the PCIJ (ICJ).

"Supplementary convention on the abolition of slavery, the slave trade, and institutions and practices similar to slavery. Done at Geneva September 7, 1956; 18 UST 3201; TIAS 6418.

"Statute of the International Atomic Energy Agency, done at New York October 26, 1956: 8 UST 1093; TIAS 3873.

"The Antarctic Treaty, signed at Washington December 1, 1969[3] 12 UST 794;

"Constitution of the International Rice Commission as amended at Saigon November 19, 1960: 13 UST 2403; TIAS 5204.

"Agreement for establishment of the Indo-Pacific Fisheries Council as amended at Karachi January 6–23, 1961: 13 UST 2511; TIAS 5218.

"Agreement for facilitating the international circulation of visual and auditory materials of an educational, scientific and cultural character, done at Lake Success July 15, 1949: TIAS 6116; 17 UST 1578.

"Convention on the settlement of investment disputes between states and nationals of other states, done at Washington March 18, 1965: 17 UST 1270; TIAS 6090.

"Single convention on narcotics drugs, 1961, done at New York March 30, 1961: TIAS 6298; 18 UST 1407.

"Protocol relating to the status of refugees. Done at New York January 31, 1967: TIAS 6577; 19 UST 6223.

"Optional protocol to the Vienna convention on consular relations concerning the compulsory settlement of disputes. Done at Vienna April 24, 1963: TIAS 6820; 21 UST.

"Convention on offenses and certain other acts committed on board aircraft. Done at Tokyo September 14, 1963: 20 UST 2941; TIAS 6768.

"APPENDIX I.—A

"The agreement of Paris, on reparation from Germany, on the establishment of an inter-Allied reparation agency and on restitution of monetary gold, opened for signature at Paris January 14, 1946 (61 Stat. (3) 3157; TIAS 1655), was signed on behalf of the United States on that date. It is followed by a *Resolution No. 8 on recourse to the International Court of Justice:* 'The Delegates of Albania, Australia, Belgium, Denmark, France, Luxembourg, the Netherlands, Norway, Czechoslovakia and Yugoslavia recommend that: "Subject to the provisions of Article 3 of Part I of the foregoing Agreement, the Signatory Governments agree to have recourse to the International Court of Justice for the solution of every conflict of law or competence arising out of the provisions of the foregoing Agreement which has not been submitted to the Parties concerned to amicable solution or arbitration".' (*Department of State Bulletin*, January 27, 1946, p. 124.)

"All the other signatories to the Paris agreement had advised of their accession to this Resolution as of July 22, 1948.

"APPENDIX I.—B

"With respect to the four Geneva conventions of August 12, 1949, for the protection of war victims, relating to: Condition of wounded and sick of the armed forces in the field (6 UST 3114; TIAS 3362); condition of wounded, sick or shipwrecked members of the armed forces at sea (6 UST 3217, TIAS 3363); treatment of prisoners of war (6 UST 3316; TIAS 3364); and protection of civilian persons in time of war (6 UST 3516; TIAS 3365). The following resolution was adopted on August 12, 1949, by the Conference of Geneva:

"Resolution I.—The Conference recommends that, in the case of a dispute relating to the interpretation or application of the present Conventions which cannot be settled by other means, the High Contracting Parties concerned endeavor to agree between themselves to refer such dispute to the International Court of Justice.

"II. BILATERAL

"A. Commercial treaties with:

"Country and date, Treaty

"Belgium, Feb. 21, 1961, 14 UST 1284; TIAS 5432.
"China, Nov. 4, 1946, 63 Stat. (2) 1299; TIAS 1871.
"Denmark, Oct. 1, 1951, 12 UST 908; TIAS 4797.

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[3] Reference to the ICJ is subject to consent, in each case, of all parties to the dispute. TIAS 1780.

"Ethiopia, Sept. 7, 1951, 4 UST 2134; TIAS 2864.
"France, Nov. 25, 1959, 11 UST 2398; TIAS 4625.
"Germany, F.R., Oct. 29, 1954, 7 UST 1839; TIAS 3593.
"Greece, Aug. 9, 1951, 5 UST (2) 1829; TIAS 3057.
"Iran, Aug. 15, 1955, 8 UST 899; TIAS 3853.
"Ireland, Jan. 21, 1950, 1 UST 785; TIAS 2155.
"Israel, Aug. 23, 1951, 5 UST 550; TIAS 2948.
"Italy, Feb. 2, 1948, 68 Stat. (2) 2255; TIAS 1965.
"Japan, Apr. 2, 1953, 4 UST 2063; TIAS 2863.
"Korea, Nov. 28, 1956, 8 UST 2217; TIAS 3947.
"Luxembourg, Feb. 23, 1962, 14 UST 261; TIAS 5306.
"Netherlands, Mar. 27, 1956, 8 UST 2043; TIAS 3942.
"Nicaragua, Jan. 21, 1956, 9 UST 449; TIAS 4024.
"Pakistan, Nov. 12, 1959, 12 UST 110; TIAS 4683.
"Togo, Feb. 8, 1966, TIAS 6193; 18 UST 1.
"Viet-Nam, Apr. 3, 1961, 12 UST 1703, TIAS 4890.

"B. Other bilateral agreements:[4]

"Treaty with Canada relating to cooperative development of water resources of the Columbia River Basin, Jan. 17, 1961, 15 UST 1555; TIAS 5638.

"Consular Convention with Korea, Jan. 8, 1963, 14 UST 1637; TIAS 5469."

Source: Stat.—United States Statutes at Large. UST—United States Treaties and Other International Agreements (volumes published on a basis beginning January 1, 1950). TIAS—Treaties and Other International Acts Series, issued singly in pamphlets by the Department of State.

[From the Congressional Record, Oct. 26, 1981]

TREATIES CAN NEVER OVERRIDE THE CONSTITUTION

Mr. **PROXMIRE.** Mr. President, one of the cornerstones of the fear campaign generated by the Liberty Lobby against the Genocide Convention, and repeated in their so-called White Paper, is the proposition that treaties automatically override the Constitution.

As evidence, they cite the "supremacy clause" of the Constitution and a statement by John Foster Dulles, whom they identify as Secretary of State under President Eisenhower. They then conclude that although the treaty is not self-implementing and requires future legislation to implement its provisions, that the Courts "would be obliged to sanction."

Mr. President, the Liberty Lobby could not be more wrong. First, they are misreading the supremacy clause of the Constitution. Second, they cite John Foster Dulles' interpretation as authoritative, which it is not. He is not a constitutional expert, his opinions do not have the force of law and, if you bother to read the footnotes, he was not even Secretary of State when he made that remark.

Finally, the courts are not obliged to sanction any legislation, which, in any way, is inconsistent with the Constitution.

Mr. President, the Liberty Lobby well knows that the Supreme Court resolved years ago that any treaty can never override the Constitution or constitutional guarantees in any way.

Mr. President, the Liberty Lobby does quote the "supremacy clause" of the Constitution accurately. Article VI, section 2 states:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

There are several points that deserve to be made here:

First, this clause has been recognized by constitutional law experts as assuring the supremacy of treaties to State law and State constitutions, not the Federal Constitution. The language is clear: Treaties are superior to "any Thing in the Constitution or Laws of any State."

Second, as noted constitutional expert, Louis Henkin, points out in his book, "Foreign Affairs and the Constitution":

"The status of a treaty as law of the land derives from and depends on its status as a valid, living treaty of the United States. It is not law of the land for either the President or the courts to enforce if it is not made in accordance with constitutional requirements, or is beyond the power of the President and Senate to make, or violates constitutional prohibitions."

His point is well taken: A treaty cannot be valid unless it is made pursuant to constitutional limitations and it cannot override the Constitution.

Third, the Supreme Court has repeatedly held that treaties cannot override the Constitution in any way. Unfortunately, the Liberty Lobby could not cite any Supreme Court cases that support their position. Why? Because there are none.

The Supreme Court has been clear and consistent: No treaty can ever override the Constitution.

Let me cite just two notable cases.

In Geofroy against Riggs in 1890, Mr. Justice Field wrote:

"The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States."

Let me repeat the key line:

"It would not be contended that it extends so far as to authorize what the Constitution forbids or a change in the character of government."

The most recent case was decided by the Court in 1957 in the case Reid against Covert. Mr. Justice Black, speaking for the Warren Court, laid the issue to rest conclusively:

"No agreement with a foreign nation can confer power on the Congress, or any other branch of government, which is free from the restraints of the Constitution.

"The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or the Executive and the Senate combined."

That opinion also further substantiates my reading, and that of most constitutional experts, of the meaning of the "supremacy clause" of the Constitution.

The opinion states:

"It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI (the Supremacy Clause) as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions."

Later in that option, Mr. Justice Black noted:

"This Court has repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null. It would be completely anomolous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument."

Mr. President, what Mr. Justice Black just said is very important and summarizes my case perfectly:

First, the courts have consistently held that treaties must be consistent with the Constitution and cannot in any way change our form of government.

Second, treaties and laws enacted by the Congress are given equal weight before the courts but equal weight below the Constitution, a fact the Liberty Lobby conveniently omits.

And, finally, that when there is ever a conflict between a treaty and a law enacted by the Congress at a later time the treaty is declared null and an act of Congress prevails.

Mr. President, it is time to end the myth that treaties can never supersede the Constitution. They cannot and it is time to set the record straight that the Genocide Convention can never override any freedoms in our Constitution. In fact, it is completely consistent with them.

I thank the distinguished majority leader and yield the floor.

[From the Congressional Record, Oct. 27, 1981]

THE GENOCIDE CONVENTION AND THE TREATYMAKING POWER

Mr. PROXMIRE. Mr. President, yesterday I discussed the allegation of the Liberty Lobby's "White Paper in the Genocide Convention" that this treaty could supersede the Constitution. As I demonstrated, the historical record is conclusive that such allegations are nonsense: First, treaties can only be valid when consistent with the Constitution; second, treaties can never supersede the Constitution; and, third, in cases where there is an inconsistency or contradiction between a treaty and a law adopted by Congress at a later time, the act of Congress prevails and the treaty which it contradicts is null and void.

Today, I would like to turn to another, perhaps more theoretical, aspect of treatymaking: That is, the contention that treaties are limited to matters which cannot be dealt with by the States. The argument has been cast many ways but it often runs like this: Genocide, in its most basic and brutal form, in murder on a large scale and the States are competent to adopt laws dealing with murder; therefore, crimes such as genocide go beyond the treaty power under the Constitution. Proponents of this view are fond of citing Thomas Jefferson's famous four conditions for treatymaking from his "Manual of Parliamentary Procedure" as authority for this interpretation.

Mr. President, far from being accepted constitutional practice, a limited interpretation of treaty powers is clearly opposite to the historical record. I intend to show that: First, this limited view of treaty powers was never fully accepted by our Founding Fathers and Jefferson recognized that; second, the Supreme Court has decisively rejected a limited interpretation of proper subjects for treaties; and, third, contemporary practice has supported the Court's interpretation.

THE MISSING WORDS OF JEFFERSON

Mr. President, it is quite clear that Thomas Jefferson favored a very limited interpretation of treaty powers but in citing selectively from his "Manual of Parliamentary Procedure," proponents of his view overlook two key points: Jefferson recognized that his interpretation was not in a clear majority among the Founding Fathers and, second, that a comparison between the Articles of Confederation and the Constitution make it clear that the omission of specific restrictions in the Constitution on treaty powers is of particular significance.

The initial lines of Jefferson's listing of conditions for treaty-making are important:

"By the Constitution of the United States, this department of legislation is confined to two branches only of the ordinary legislature—the President originating and the Senate having a negative. To what subjects this power extends has not been defined in detail by the Constitution nor are we entirely agreed among ourselves. . . ."

That final line, seldom quoted, is important on two counts.

First, Jefferson explicitly recognized that his view was not universally held by the other Founding Fathers.

Second, the fact that the Constitution did not spell out in detail any limitations on treaty power is important when contrasted with the restraints imposed upon treatymaking powers by the Articles of Confederation, the predecessor to our Constitution. That document prohibited treaties which would restrain state legislatures from:

"Imposing such posts and duties on foreignors as their own people are subject to, or from prohibiting the exportation or importation of any species or commodities whatsoever."

In this light, the omission of specific prohibitions on subjects for treatymaking takes on additional significance.

THE SUPREME COURT'S INTERPRETATION

The Supreme Court's record also clearly reinforces this broad interpretation of the proper subjects for treaties.

From the beginning of the Republic, the Court had tended to uphold treaty makers in any challenge regarding the propriety of subject matter. While most of these decisions did not specifically address the question of subject matter, Justices often outlined their views in dicta. One of the cases to which I referred yesterday, contained just that type of pronouncement. Mr. Justice Field in Geofrey against Riggs (1890) noted regarding treaty powers that:

"It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government, or in that of one of the States, or a cession of the portion of the latter, without its consent . . .

"But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted."

The second case that I want to cite is perhaps the most celebrated and analyzed constitutional law case, Missouri against Holland.

In this case, decided in 1920, the Court was reviewing a challenge to the validity of a congressional statute implementing a Migratory Bird Treaty between the United States and Canada. It was the contention of the State of Missouri that this statute went beyond the authority of the Federal Government and that it could not have been adopted except pursuant to a treaty.

The decision, rendered by Mr. Justice Holmes, had an enormous impact. It conclusively dismissed the claim of Missouri—and, by extension, the Jeffersonian view—that the treaty power was limited by any form of unstated extension (or as Holmes phrased it "invisible radiation") from the 10th amendment.

Oliver Wendell Holmes' opinion has remained the controlling interpretation of treaty power since that time.

THE CONTEMPORARY PERIOD

Interestingly, one who did question this decision, Senator Bricker, provided backhanded support for Holmes' view. In an unsuccessful effort between 1952 and 1957 to "overrule" the Missouri case, Senator Bricker led a fight for a constitutional amendment. The very fact that Bricker pursued a constitutional amendment strategy suggests an awareness of the lack of constitutional restraints upon treaty powers. The Missouri case, then, was not a case of misinterpretation by the Court to be reversed at a later date but rather a correct interpretation, with which he disagreed, and sought to remedy constitutionally. Otherwise, as Prof. Louis Henkin notes, his struggle would have been "largely unnecessary, legally as well as politically."

The contemporary record provides more straightforward endorsement of this view. The Senate has given its advice and consent to a series of treaties, running the gamut from political rights of women to protection of whales, safeguards against hijacking and political terrorism to protection of the seas against oil spills.

While some of these treaties have been challenged on political grounds, the authority of the United States to enter into these agreements has been virtually unquestioned—further proof that the broad scope of treaty powers is unquestioned today.

IN CONCLUSION

Mr. President, it is clear that the treaty powers of the Constitution have been fully recognized, and exercised, as unfettered since the definite Missouri case.

The only overarching limitations, and I discussed them yesterday, are the requirements that treaties be consistent with the Constitution and that they may never supersede the Constitution or impinge upon constitutional freedoms.

Yet, in our exercise of that unfettered power, Mr. President, we have failed to give our advice and consent to the one treaty which embodies the highest of American ideals, the right to live.

Mr. President, there is no constitutional impediment to ratification of this treaty. It is perfectly consistent with our Constitution and deserves our fullest support. I urge my colleagues to join me in seeking prompt ratification.

[From the Congressional Record, Oct. 28, 1981]

THE MENTAL HARM CLAUSE OF THE GENOCIDE CONVENTION

Mr. PROXMIRE. Mr. President, today I should like to examine the interpretation of the mental harm clause in article II of the Genocide Convention.

The Liberty Lobby's "white paper on the Genocide Convention" alleges that this clause will:

Inhibit law enforcement agencies from taking action against any identifiable group;

Subject this Nation to prosecution before the world court for our racial segregation policies prior to 1954; and

Curtail our freedom of speech by inhibiting authors who fear they may inflict mental harm on a group of readers.

Mr. President, these allegations are completely false and I intend to prove it point by point.

But first, it is important to look at the exact wording dealing with mental harm in the Genocide Convention. Article II states:

"In the present Convention, genocide means any of the following acts committed with intent to destroy in whole or in part, a national, ethnical, racial or religious group."

Subsection (b) defines one of the prohibited acts as "causing serious bodily or mental harm to members of the group."

Mr. President, to the extent that there was ever any ambiguity regarding this phrase—and I do not believe it is vague at all—that question was resolved by the understanding recommended by the Senate Foreign Relations Committee defining serious mental harm as "permanent impairment of mental faculties."

According to former Ambassador Charles Yost:

"This standard is rigid enough to discourage frivolous allegations of genocide through mental harm."

But the Liberty Lobby thinks differently. So let us examine each of their arguments in turn.

Their first point—that law officers might be inhibited to take action against any identifiable group for fear of being charged with genocide—is absurd. Why? The Liberty Lobby is ignoring the basic definition of genocide contained in the treaty. What does it say? To be convicted of genocide, an individual must commit that act with the intent to destroy—let me repeat that: Intent to destroy, in whole or in part, a national, ethnical, racial, or religious group. Under our Constitution, laws could not be enacted with intent to destroy groups within our society.

Therefore, there is no chance—and I mean none—that routine law enforcement could ever meet this treaty's definition of genocide.

Their second argument—a fear that racial segregation policies prior to 1954 might be held as genocide by a world court—is impossible. This treaty is simply not retroactive. Not in any way.

Finally, the argument that freedom of speech might be curtailed as authors worried about inflicting mental harm on groups of their readers is also ridiculous. The understanding recommended by the Foreign Relations Committee classifies mental harm as having inflicted permanent impairment of mental faculties for a substantial portion of the group. In addition, as I have noted earlier, an individual's intent to commit genocide would have to be clearly established.

Mr. President, even the American Civil Liberties Union, which places utmost priority on preservation of constitutional guarantees, does not draw this spurious connection between the mental harm clause and loss of freedom of speech. They stand firmly behind this treaty, convinced that our constitutional freedoms remain intact.

In short, these allegations are unfounded on every count.

Mr. President, with each passing year, the support for the Genocide Convention continues to grow. As the American Bar Association recognized in 1976, the objections raised in opposition to this convention have simply not withstood the test of time.

Mr. President, the American Bar Association was courageous enough to admit their mistake in opposing the convention. I hope that, someday, Liberty Lobby will display that same courage.

Mr. President, I urge my colleagues to join with me in seeking ratification of the Genocide Convention.

[From the Congressional Record, Oct. 30, 1981]

THE GENOCIDE CONVENTION WOULD NOT ENDANGER AMERICAN SERVICEMEN IN ANY WAY

Mr. PROXMIRE. Mr. President, consider the allegations made in the Liberty Lobby's "White Paper on the Genocide Convention": that if this treaty were ratified our officers and enlisted men are certain to be charged with genocide in the fulfillment of their duties.

Mr. President, here we have a classic example of Liberty Lobby's style of argumentation. They make this preposterous allegation—without any substantiation whatsoever. There is not one shred of evidence in this report—not one—to back up this statement.

Let us look at the facts, Mr. President.

First, what does our own Defense Department have to say about the Genocide Convention? After all, I know of no other agency of the U.S. Government which is more concerned about the impact of any treaty upon our servicemen.

And what do they say? Ratification of the Genocide Convention would be a "positive step in the national interest of our country." A positive step in our national interest, Mr. President.

That view is shared not only by the level of the Secretary of Defense but each and every branch of our Armed Forces and I ask unanimous consent that letters from each of the branches of our Armed Forces to the American Bar Association be reprinted in the Record at the conclusion of my remarks.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

(See exhibit 1.)

Mr. PROXMIRE. Second, the State Department shares the views of the Defense Department that this treaty poses no threat to our servicemen. As David Abshire, Assistant Secretary of State, pointed out in the 1976 hearings before the Foreign Relations Committee, the Genocide Convention "does not alter the rules of warfare or the obligations of parties to the Geneva Conventions on the treatment of prisoners of war." Nor does it "apply to civil wars."

Third, as George Aldrich, the deputy legal adviser for the State Department during the Nixon administration, made clear during the 1970 hearings: The United States has always reserved for itself exclusive jurisdiction over the actions of our servicemen during time of war.

This is a further safeguard, Mr. President, which would prevent spurious charges of genocide.

Fourth, and here is a point of commonsense, Mr. President, that cannot be emphasized enough: This treaty requires proof of intent.

Intent to eliminate in whole or in part a national group. Intent to eliminate in whole or in part a racial group. Intent to eliminate in whole or in part a religious group. Intent to eliminate in whole or in part an ethnic group. "Intent" is the key word, Mr. President.

And as Bruno Bitker, a prominent member of the American Bar Association and one of the most eloquent experts on this treaty, points out hostile actions in combat situations do not in and of themselves contain this necessary element of "intent."

In conclusion, Mr. President, the Liberty Lobby throughout its "White Paper on the Genocide Convention" has consistently strayed from the facts. Instead it has relied on innuendo and unfounded allegations to make its points. Their rhetoric has only served to underscore the weakness of their case.

Mr. President, as I have pointed out, time and again, this treaty merely seeks to extend on an international level a fundamental principle long recognized and cherished by all Americans: the right of all groups, ethnic, racial, religious, and national to exist. The precious rights to live.

This treaty is perfectly consistent with our Constitution and, as our own Defense Department has pointed out, it is in our national interest.

Mr. President, we have waited far too long to ratify this important convention. Let us not wait any longer.

"EXHIBIT I

"GENERAL COUNSEL
OF THE DEPARTMENT OF DEFENSE,
"*Washington, D.C., February 9, 1976.*

"HARRY A. INMAN, Esq.,
"*Delegate, Section of International Law, to House of Delegates, American Bar Association, Washington, D.C.*

"DEAR MR. INMAN: I appreciate your calling to my attention the Section's Resolution on the Genocide Convention which will be presented to the House of Delegates at its Midyear Meeting February 16 and 17.

"The Department of Defense fully supports the position of the Administration that the United States should accede to the Genocide Convention with the Understandings and Declaration which were approved by the Senate Committee on Foreign Relations in S. Exec. Report No. 93-5, 93rd Congress, 1st Sess., (1973).

"Inasmuch as the Section's Resolution is in complete accord with that position, I am pleased to endorse it by this letter. I share the Section's conclusion that acceding to the Convention would be a 'positive step in the national interest of our country.'

"RICHARD A. WILEY."

"DEPARTMENT OF THE NAVY,
OFFICE OF THE
JUDGE ADVOCATE GENERAL,
"Washington, D.C., February 13, 1976.

"HARRY A. INMAN, ESQ.,
"Delegate, Section of International Law, to House of Delegates, American Bar Association, Washington, D.C.

"DEAR MR. INMAN: Your letter of February 4, 1976, to Mr. Waldemar Solf concerning the Genocide Convention has been brought to my attention. I am also aware of the views expressed by Mr. Richard A. Wiley, General Counsel, Office of the Secretary of Defense, in his letter on this subject of February 9, 1976.

"I share the views expressed by Mr. Wiley and endorse the resolution of the American Bar Association's Section on International Law concerning the Genocide Convention.

"I support accession to the Convention subject to the Understandings and Declaration approved by the Committee on Foreign Relations of the United States Senate.

"Sincerely,

"WILLIAM O. MILLER,
"Rear Admiral, JAGC, U.S. Navy,
"Deputy Judge Advocate General."

"DEPARTMENT OF THE ARMY,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
"Washington, D.C., February 11, 1976.

"HARRY A. INMAN, ESQ.,
"Delegate, Section of International Law, to House of Delegates, American Bar Association, Washington, D.C.

"DEAR MR. INMAN: Mr. Solf has called my attention to your letter of 4 February 1976 requesting the support of the service Judge Advocates General for the resolution of the ABA Section on International Law concerning the Genocide Convention.

"I am pleased to concur in the views expressed by Mr. Richard A. Wiley, General Counsel, Office of the Secretary of Defense, in his letter of 9 February to you. I endorse the Section's resolution and fully support accession to the Genocide Convention with the Understandings the Declaration which were approved by the Senate Committee on Foreign Relations.

"Sincerely,

"WILTON B. PERSONS, Jr.,
"Major General, U.S.A.
"The Judge Advocate General."

"DEPARTMENT OF THE AIR FORCE,
"Washington, D.C., February 13, 1976.

"HARRY A. INMAN, ESQ.,
"Delegate, Section of International Law, to House of Delegates, American Bar Association, Washington, D.C.

"DEAR MR. INMAN: At the request of Air Force members of the ABA Section of International Law, I have reviewed the Section's recommendation and report concerning the Genocide Convention.

"I believe reluctance by the United States to become a party to the treaty may be subject to misinterpretation in other countries. The laws of the United States under which the U.S. Air Force operates are consistent with the principles of the Convention. Accordingly, I agree with the view of the Defense Department's General Counsel that accession to the Genocide Convention, with the understandings and Declarations approved by the Senate Committee on Foreign Relations, would be a positive step.

"Sincerely,

"HAROLD R. VAGUE,
"Major General,
"The Judge Advocate General, U.S. Air Force."

[Annex 3]

[From the Congressional Record, Mar. 16, 1976]

DEFENSE DEPARTMENT ENDORSES GENOCIDE CONVENTION

Mr. PROXMIRE. Mr. President, I am extremely pleased to report yet another series of endorsements of ratification of the Genocide Convention. Not only has the General Counsel of the Department of Defense endorsed the treaty but so has the Judge Advocate General for the Army, Air Force, and Navy in separate opinions. It is especially significant that the Defense Department has recognized that the Genocide Convention poses absolutely no threat to the United States, and that ratification would be a "positive step in the national interest of our country." This endorsement should allay the concerns of those who mistakenly argue that the convention would weaken our international standing.

The American Bar Association last month took up the issue of the Genocide Convention, which the ABA had consistently refused to support in past years. The ABA quite properly wanted to find out where the Defense Department stood on the Genocide Convention before making its own decision. The Defense Department unequivocally expressed their support of the Genocide Convention as subject to the understandings and declaration approved by the Committee on Foreign Relations of the Senate. Subsequent to the Defense Department's recommendation for Senate ratification, the ABA House of Delegates overwhelmingly voted to approve the Genocide Convention.

Virtually every major organization in the United States has expressed its support of the Genocide Convention. The recent announcements by the ABA and the Department of Defense should serve to convince those who have remained skeptical of the Genocide Convention that we should ratify the treaty. I sincerely hope that we can expedite the ratification of the convention so that we can join the world community in its admirable effort to combat genocide.

I ask unanimous consent that the letters from Richard A. Wiley, General Counsel of the Department of Defense; William O. Miller, Deputy Judge Advocate General of the Navy; Wilton B. Persons, Jr., and Harold R. Vague, Judge Advocate General of the Army and Air Force, respectively, endorsing the Genocide Convention be printed in the Record.

There being no objection, the letters were ordered to be printed in the Record, as follows:

"GENERAL COUNSEL OF
THE DEPARTMENT OF DEFENSE,
"*Washington, D.C., February 9, 1976.*

"HARRY A. INMAN, Esq.,
"*Delegate, Section of International Law, To House of Delegates, American Bar Association, Washington, D.C.*

"DEAR MR. INMAN: I appreciate your calling to my attention the Section's Resolution on the Genocide Convention which will be presented to the House of Delegates at its Midyear Meeting February 16 and 17.

"The Department of Defense fully supports the position of the Administration that the United States should accede to the Genocide Convention with the Understandings and Declaration which were approved by the Senate Committee on Foreign Relations in S. Exec. Report No. 93-5, 93rd Congress, 1st Sess. (1973).

"Inasmuch as the Section's Resolution is in complete accord with that position, I am pleased to endorse it by this letter. I share the Section's conclusion that acceding to the Convention would be a "positive step in the national interest of our country."

"RICHARD A. WILEY."

"DEPARTMENT OF THE NAVY,
OFFICE OF THE
JUDGE ADVOCATE GENERAL,
"*Washington, D.C., February 13, 1976.*

"HARRY A. INMAN, Esq.,
"*Delegate, Section of International Law, To House of Delegates, American Bar Association, Washington, D.C.*

"DEAR MR. INMAN: Your letter of February 4, 1976, to Mr. Waldemar Solf concerning the Genocide Convention has been brought to my attention. I am also aware of the views expressed by Mr. Richard A. Wiley, General Counsel, Office of the Secretary of Defense, in his letter on this subject of February 9, 1976.

"I share the views expressed by Mr. Wiley and endorse the resolution of the American Bar Association's Section on International Law concerning the Genocide Convention.

"I support accession to the Convention subject to the Understandings and Declaration approved by the Committee on Foreign Relations of the United States Senate.

"Sincerely,

"WILLIAM O. MILLER,
"*Rear Admiral, JAGC, U.S. Navy,*
"*Deputy Judge Advocate General.*"

"DEPARTMENT OF THE ARMY,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
"*Washington, D.C., February 11, 1976.*

"HARRY A. INMAN, Esq.,
"*Delegate, Section of International Law, To House of Delegates, American Bar Association, Washington, D.C.*

"DEAR MR. INMAN: Mr. Solf has called my attention to your letter of 4 February 1976 requesting the support of the service Judge Advocates General for the resolution of the ABA Section on International Law concerning the Genocide Convention.

"I am pleased to concur in the views expressed by Mr. Richard A. Wiley, General Counsel, Office of the Secretary of Defense, in his letter of 9 February to you. I endorse the Section's resolution and fully support accession to the Genocide Convention with the Understandings and Declaration which were approved by the Senate Committee on Foreign Relations.

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"WILTON B. PERSONS, Jr.,
"*Major General, USA,*
"*The Judge Advocate General.*"

"DEPARTMENT OF THE AIR FORCE,
"*Washington, D.C., February 13, 1976.*

"HARRY A. INMAN, Esq.,
"*Delegate, Section of International Law, To House of Delegates, American Bar Association, Washington, D.C.*

"DEAR MR. INMAN: At the request of Air Force members of the ABA Section of International Law, I have reviewed the Section's recommendation and report concerning the Genocide Convention.

"I believe reluctance by the United States to become a party to the treaty may be subject to misinterpretation in other countries. The laws of the United States under which the U.S. Air Force operates are consistent with the principles of the Convention. Accordingly, I agree with the view of the Defense Department's General Counsel that accession to the Genocide Convention, with the understandings and Declarations approved by the Senate Committee on Foreign Relations, would be a positive step.

"Sincerely,

"HAROLD R. VAGUE,
"*Major General,*
"*The Judge Advocate General,*
"*U.S. Air Force.*"

[Annex 4]

MILLIONS OF AMERICANS SUPPORT THE GENOCIDE CONVENTION

The following is a list of 52 labor, civic, religious and nationality groups which represent millions of Americans that have endorsed the Genocide Convention.

Amalgamated Clothing and Textile Workers Union, AFL–CIO; American Baptist Convention; American Civil Liberties Union; American Ethical Union; American Federation of State, County and Municipal Employees, AFL–CIO; American Federation of Teachers, AFL–CIO; American Friends Service Committee; American Humanist Association; American Jewish Committee; American Jewish Congress; American Roumanian National Committee; American Veterans Committee; Americans for Democratic Action; Anti-Defamation League of B'nai B'rith; Baha'i National Spiritual Assembly of the U.S.A.

B'nai B'rith; B'nai B'rith Women; Emma Lazarus Federation of Jewish Women's Clubs; Episcopal Church; Friends Committee on National Legislation; Hadassah, The Women's Zionist Organization of America; Industrial Union Department, AFL–CIO; International Ladies Garment Workers Union, AFL–CIO; International Rescue Committee; International Union of Electrical Workers, AFL–CIO; Jewish Labor Committee; Jewish War Veterans; Labor Zionist Alliance; League for Industrial Democracy; Methodist Church, General Board of Christian Social Concerns; National Association of Negro Business and Professional Women's Clubs; National Association for the Advancement of Colored People; National Board, YWCA; National Catholic Conference for Interracial Justice; National Conference of Christians and Jews; National Council of Jewish Women; National Jewish Community Relations Advisory Council; National Panel of American Women; Retail, Wholesale and Department Store Union, AFL–CIO; Ukranian Congress Committee of America.

Ukrainian National Association; Union of American Hebrew Congregation; Union of Orthodox Jewish Congregations of America; Unitarian Universalist Association; United Automobile Workers of America; United Church of Christ; United Synogogue of America; Women United for the United Nations; Women's International League for Peace and Freedom; Workers Defense League; Workmen's Circle; World Federalists, U.S.A.; and World Jewish Congress, American Section.

[Annex 5]

[From the University of Pennsylvania Law Review]

THE CONSTITUTION, TREATIES, AND INTERNATIONAL HUMAN RIGHTS

(Louis Henkin)*

By a coincidence of which, no doubt, few were aware, the year 1968, the centenary of the fourteenth amendment to the American Constitution, was designated by the United Nations General Assembly as "International Human Rights Year."[1] On such ceremonial occasions, coincidence alone might warrant the exploration of a possible relationship between the occasions celebrated. It is in fact not difficult to find significant links between human rights as enjoyed under the fourteenth amendment and other provisions of the American Constitution, and human rights as they exist in other countries. The actions of the United States have affected human rights in other nations, as well as international efforts to improve the observance of such rights.

While influence can never be measured and often cannot be proved, one can assert with confidence that the United States has inspired ideas, movements, laws, and events which have promoted human rights in other countries. The American Constitution, particularly the Bill of Rights and the fourteenth amendment, have left their traces in a hundred constitutions and in thousands of laws, charters and manifestos.[2] American concern about human rights has been exported by American foreign policy and diplomacy, in protests on the mistreatment of minorities by Czars and Hitlers; in peace treaties requiring the vanquished to respect the rights of minorities (after World War I), or of all persons (after World War II); in the growing protections of customary international law assuring justice to aliens, in burgeoning doctrines assuring basic rights to all; in the human rights provisions of the UN Charter;[3] in the UN Declaration of Human Rights;[4] in covenants drafted under the auspices of the UN; and in conventions and institutions of European and other regional bodies.

Influence, of course, has not been a one-way street. Many of the rights protected by the Constitution owe much to French and British antecedents. More recently, the ideas and experiences of others have helped bring our eighteenth-century Constitution up to the needs of a new age. Our constitutional fathers were concerned with the protection of "natural" individual freedoms from too much governmental interference; only after a world depression did Congress begin to provide "rights of welfare," and it was not easy to persuade the Supreme Court of the constitutionality of such legislation.[5] New rights of equality and new conceptions of freedom required constitutional reinterpretation[6] and bold legislation.[7] The UN Charter and the UN Declaration of Human Rights have been invoked in American courts to supplement rights protected by the Constitution.[8] Political forces—the existence of United Nations, the competition of Communist ideology, the influence of new nations—surely have had an impact on the actual state of human rights in the United States, and particularly on the rights of the Negro.

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*Lines Professor of Law, Columbia University. B.A. 1937, L.H.D. 1963, Yeshiva University; LL.B. 1940, Harvard University. Member, New York Bar.

[1] G.A. Res. 1961, 18 U.N. GAOR Supp. 15, at 43, U.N. Doc. A/5515 (1963).

[2] Some constitutions were drafted under direct American authority or influence; for example, those of Liberia, the Philippines, the Federal Republic of Germany and postwar Japan. For similarities between the American Constitution and others, see synoptic tables in 3 A. Peaslee, Constitutions of Nations 556–63 (1950).

[3] U.N. Charter art. 1, para. 3, art. 13, para. 1b, arts. 55–72.

[4] G.A. Res. 217, U.N. Doc. A/810 at 71–77 (1948).

In one respect, however, the United States has resisted the influence of others within our borders and has refused to cooperate in promoting rights elsewhere. Although the American government has insisted that observance of human rights is indispensable to international peace and security; although our own observance of human rights is, in most respects, as high as any in the world; although the United States has obligated itself to cooperate with other nations and international organizations to promote human rights;[9] although American representatives have played principal roles in drafting declarations and covenants advancing freedom and justice—the United States has generally refused to adhere to international efforts to establish common minimum standards for individual human rights. The Genocide Convention has vainly sought the consent of the United States Senate since 1949.[10] The United States did not sign the convention, which it helped draft and promote, on the status of refugees.[11] Secretary of State Dulles officially renounced any intention to adhere to conventions on human rights which the UN was drafting.[12] When President Kennedy abandoned the Dulles policy and sent three minor conventions to the Senate,[13] the Foreign Relations Committee failed to recommend consent to two of them.[14]

The last decade even saw a determined effort, led by Senator Bricker, to amend the United States Constitution in ways principally designed to make American adherence to human rights covenants impossible.[15] That effort failed, but lawyers now are endeavoring to use the Constitution as it is to reach the same end.[16] Amendment, they maintain, is not necessary to prohibit American participation in human rights covenants: the Constitution, they say, already forbids the use of the treaty power for such purposes since the human rights of American inhabitants are essentially a matter of domestic, not international, concern.[17]

I shall not consider here whether it is in the interest of the United States to adhere to any particular human rights agreement, or even whether, in principle, the United States should join in cooperative efforts to promote human rights through conventions setting uniform minimum standards of respect for the rights of a nation's own inhabitants. My concern is exclusively with the constitutional objections that are raised against American participation in international treaties on human rights.[18] I am convinced that the argument that the United States is without power under the Constitution to adhere to such treaties has no basis whatever—in the language of the Constitution, in its *travaux préparatoires*, in the institutions it established, in its principles of federalism or of separation of powers, in almost two centuries of constitutional history, or in any other consideration relevant to constitutional interpretation.

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[5] *Compare* United States v. Butler, 297 U.S. 1 (1936), *with* Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).

[6] *See, e.g.,* Brown v. Board of Educ., 347 U.S. 483 (1954); Griffin v. Illinois, 351 U.S. 12 (1956).

[7] Civil Rights Act of 1964, 78 Stat. 241–68 (1964), 28 U.S.C. § 1447(d) (1964), 42 U.S.C. §§ 1971, 1975a–1975d, 2000a–2000h–6 (1964).

[8] *Compare* Oyama v. California, 332 U.S. 633, 649–50 (concurring opinion), 673 (concurring opinion) (1948), *with* Hurd v. Hodge, 162 F.2d 233, 245–46 (D.C. Cir. 1947), *aff'd,* 334 U.S. 24, 34–35 (1948), *and* Sei Fujii v. State, 217 P.2d 481, 486–88 (Cal. Dist. Ct. App. 1950), *aff'd on other grounds,* 38 Cal. 2d 718, 242 P.2d 617 (1952).

[9] U.N. Charter arts. 55–56.

[10] Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 278, *entered into force* Jan. 12, 1951. President Truman transmitted the Convention to the Senate for its consent on June 16, 1949, *see* 95 Cong. Rec. 7825 (1949).

[11] Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (1954).

[12] 32 Dep't of State Bull. 820, 822 (1955); *see* note 69 *infra* and accompanying text.

[13] *See* note 66 *infra.*

[14] 109 Cong. Rec. 13046 (1963); 113 Cong. Rec. 15750–51 (daily ed. Nov. 2, 1967).

[15] The principal version of the Bricker Amendment, prepared by the American Bar Association, is contained in *Hearings on S.J. Res. 1 and S.J. Res. 43 Before a Subcomm. of the Senate Comm. on the Judiciary,* 83d Cong., 1st Sess. at 35–36 (1953).

[16] American Bar Association, *Report of the Standing Committee on Peace and Law Through United Nations: Human Rights Conventions and Recommendations,* 1 Int'l Law. 600, 607 (1967); *see Hearings on Human Rights Conventions Before a Subcomm. of the Senate Comm. on Foreign Relations,* 90th Cong., 1st Sess., *passim* (1967).

[17] American Bar Association, *Report of the Standing Committee on Peace and Law Through United Nations: Human Rights Conventions and Recommendations,* 1 Int'l Law. 600, 601 (1967).

I

Article II, section 2 of the Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." The Constitution does not define treaties; the framers knew what treaties were and, no doubt, did not see any need to define what was well known in international law and practice. Nor does the Constitution state that there are matters which cannot properly be the subject of a treaty, or that there are other limitations on treaties and the treaty power.[19]

Still, while no treaty or treaty provision has ever been declared unconstitutional, it is settled that treaties are subject to constitutional limitations. There was once a myth that his was not so. The view that treaties are not subject to constitutional limitations found support in the language of the supremacy clause and in an ambiguous suggestion by Mr. Justice Holmes.[20] But the question was thoroughly explored during the Bricker controversy, and everyone, on both sides, firmly rejected that view. In 1957, in *Reid* v. *Covert*,[21] Mr. Justice Black seized the occasion to lay that ghost to rest. Although there was no majority opinion of the Court, and Justice Black's statement was perhaps not necessary to his result, he stated that treaties, like laws, must be made "in pursuance of" the Constitution, and that—

> no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution. . . .
>
> The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.[22]

From our constitutional beginnings there have also been suggestions that the treaty power is limited—by implication—by other provisions of the Constitution, by the Constitution as a whole, or by the philosophy that permeates it and the institutions it established. Such limitations have principally been implied from the provisions for the separation of powers among the branches of the federal government and the division of authority between the government and the states.[23] An early statement of such limitations is found in Jefferson's

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[18] I have dealt at length with basic constitutional doctrine about treaties in L. Henkin, Arms Control and Inspection in American Law (1958) [hereinafter cited as Arms Control], particularly in chapter III, at 25–46. *See also* Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903 (1959) [hereinafter cited as *Law of the Land*]; Henkin, *The Treaty Makers and the Law Makers: The Niagara Reservation*, 56 COLUM. L. REV. 1151 (1956) [hereinafter cited as *Niagara Reservation*].

[19] International law and practice know no limitation here relevant. *See* L. Oppenheim, International Law § 501 (8th ed. H. Lauterpacht 1955). *But cf.* U.N. Charter art. 103.

[20] Mr. Justice Holmes said:

> Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention.

Missouri v. Holland, 252 U.S. 416, 433 (1920).

U.S. Const. art. VI, cl. 2 provides in part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . ."

See also Arms Control 29, 169–70 n.14. The myth was repeated by John Foster Dulles shortly before he became Secretary of State, but he later repudiated the statement. *Id.* at 171 n.14.

[21] 354 U.S. 1 (1957).

[22] *Id.* at 16–17. *See also* Arms Control 173 n.17. Justice Black expounded the reasons for the language of the supremacy clause that struck Holmes, *see* note 20 *supra*. *See generally* Arms Control 169–72 n.14.

Even the first amendment, which begins, "Congress shall make no law . . ." applies to treaties as well. *See* Arms Control 37, 179 n.44.

[23] Various statements to this effect going back to our early history are collected in H. Tucker, Limitations on the Treaty-Making Power §§ 2–51 (1915), and Mikell, *The Extent of the Treaty-Making Power of the President and Senate of the United States*, 57 U. Pa. L. Rev. 435, 436–38 n.1 (1909).

Manual of Parliamentary Practice:

> By the Constitution of the United States, this department of legislation is confined to two branches only, of the ordinary legislature; the President originating and the Senate having a negative. To what subject this power extends, has not been defined in detail by the Constitution, nor are we entirely agreed among ourselves. (1) It is admitted that it must concern the foreign nation, party to the contract, or it would be a mere nullity, *res inter alios acta*. (2) by the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaty, and cannot be otherwise regulated. (3) It must have meant to except out of these *the rights reserved to the States;* for surely the President and Senate cannot do by treaty what the whole government is interdicted from doing in any way. (4) And also to except these subjects of legislation in which it gave a participation to the House of Representatives. This last exception is denied by some, on the ground that it would leave very little matter for the treaty power to work on. The less the better, say others.[24]

As the final sentence may imply, Jefferson was no friend of the treaty power.[25] Indeed, the limitations he enumerates leave little room for treaties. Under his final clause, a treaty cannot deal with matters which are within the enumerated powers of Congress. By the third limitation, the treaty power cannot deal with matters reserved to the states—presumably, those not expressly conferred upon the national government or some branch of it, principally upon Congress by the eighth section of article I.[26] If a treaty can deal either with matters designated to Congress, nor with matters not delegated to Congress, it can deal with very little.[27]

These clauses in Jefferson's manual have long been famous examples of his bad guesses, and notable evidence that ours has not become a Jeffersonian Constitution. Everyone today agrees that a treaty can deal with matters on which Congress may legislate.[28] Under contemporary views of the powers of Congress, this excludes very little. Indeed, I have suggested that there is practically nothing that is dealt with by treaty that could not also be the subject of legislation by Congress.[29] In practice, the treaty makers have frequently concluded agreements dealing with matters concerning which Congress could also legislate, such as tariffs and other regulations of commerce with foreign nations. Also, treaties have frequently dealt with matters which, apart from treaty, seemed reserved to the states: for example, the rights of aliens to inherit property [30] or to engage in local occupations. Almost half a century ago, Mr. Justice Holmes, in *Missouri v. Holland*,[31] settled that, since the treaty power was delegated to the federal government, what is within that power is not reserved to the states.[32] Treaties, then, are not limited by any "invisible radiation" [33] from the truism that is the tenth amendment.[34] Because *Missouri v. Holland* finally disposed of Jefferson's third limitation, Senator Bricker sought to have the Constitution amended to "repeal" that case. The decision has never been questioned in the Supreme Court, and Senator Bricker's abortive attempts only reaffirmed its continuing validity.

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[24] T. Jefferson, Manual of Parliamentary Practice 110 (1876), quoted in 5 J. Moore, Digest of International Law 162 (1906). *See also* the remarks of John Calhoun made in 1816, recorded in 29 Debates and Proceedings in the Congress of the United States 532 (1854).

[25] In 2 J. Story, Commentaries on the Constitution of the United States 339 n.3 (5th ed. 1891), Joseph Story said:

> Mr. Jefferson seems at one time to have thought that the Constitution only meant to authorize the President and Senate to carry into effect, by way of treaty, *any power they might constitutionally exercise*. At the same time, he admits that he was sensible of the weak points of this position. 4 Jefferson's Corresp. 498. What are such powers given to the President and Senate? Could they make appointments by treaty?

[26] This is the common interpretation of Jefferson's dictum. Of course, if one recognizes that the treaty power is one of the powers delegated to the federal government, and that what comes within it is therefore not reserved to the states, one could accept Jefferson's statement to mean that there may be some special areas reserved to the states even as regards the treaty power, for example, that a treaty cannot cede territory of a state without its consent. *See* text accompanying note 37 *infra*.

[27] Presumably it could deal with matters which are in the President's domain under the Constitution.

[28] *See* Q. Wright, the Control of American Foreign Relations § 59 (1922). The Supreme Court itself never gave any encouragement to the view that treaties cannot deal with matters that are within the powers delegated to Congress. On the contrary, it has always insisted that a treaty and statute might deal with the same matter, and that, for example, if the two were inconsistent the later in time would prevail. *E.g.*, Whitney v. Robertson, 124 U.S. 190 (1888); *see* Arms Control 29–31, 173–76 nn.20–23.

[29] *See Law of the Land* 913–30. Since that was written the Supreme Court has found additional powers of Congress in the enforcement clause of the fourteenth amendment. *See* Katzenbach v. Morgan, 384 U.S. 641 (1966). *See also* United States v. Guest, 383 U.S. 745 (1966).

[30] Arms Control 33–34, 176 n.25, 17 n.28. *Compare* Clark v. Allen, 331 U.S. 503 (1947), *with* Asakura v. Seattle, 265 U.S. 332 (1924), *and* Hauenstein v. Lynham, 100 U.S. 483 (1879). For the authority of states to deal with inheritance by aliens in the absence of treaty, *see* Zschering v. Miller, 389 U.S. 429 (1968).

[31] 252 U.S. 416, 433 (1920). Contrary to some impressions, Holmes was not making new law. Arms Control 33–34, 176 n.25.

Opponents of American adherence to human rights conventions cannot, and do not, invoke the long-rejected Jeffersonian limitations just discussed.[35] While not unrelated to these propositions, their arguments are essentially closer to Jefferson's first two limitations—that a treaty "must concern the foreign nation," and that it must deal with "objects which are usually regulated by treaty, and cannot be otherwise regulated." These limitations, perhaps, are also implied in the assertions that treaties cannot deal with matters that are "of domestic concern" or matters "essentially within the domestic jurisdiction of the United States."

The fact that two of Jefferson's four contentions have been clearly rejected by later interpretations of the Constitution might be enough to dismiss him as an authority on the scope of the treaty power today. Still, all his suggestions require consideration on their merits, and Jefferson's first two limitations have support in other authority, including some in the *United States Reports*.

In the Supreme Court, the best known statement of implied limitations on the treaty power is probably that made by Mr. Justice Field in *Geofroy v. Riggs:*

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. . . . But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.[36]

Mr. Justice Field does not expound what restraints arise "from the nature of the government itself and of that of the States." It may be that these restraints consist only of those he specifies, for example, that a treaty cannot cede territory of a state without its consent.[37] But some additional limitation may be implied in his suggestion that treaties can deal with "any matter which is *properly* the subject of negotiations with a foreign country." [38]

In other cases, too, there are dicta that treaties may deal with:

"all those objects which in the intercourse of nations, had usually been regarded as the proper subject of negotiation and treaty;" [39]

"all proper subjects of negotiation between our government and other nations;" [40]

"all subjects that properly pertain to our foreign relations." [41]

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[32] *See Law of the Land* 939–13. Even before Missouri v. Holland, 262 U.S. 416 (1920). the view expounded by Justice Holmes was that of the majority. Arms Control 33–34, 176 n.25. On the other hand, even after *Missouri v. Holland* was decided, its implications were not clearly understood, sometimes even by American negotiators. For example, American representatives for some time continued to claim that the United States could not undertake to regulate the manufacture of armaments because manufacturing was local and reserved to the states. The Department of State recognized its error several years later and officially abandoned the position in 1932. Arms Control 176–77 n.25.

[33] Missouri v. Holland, 252 U.S. 416, 434 (1920) (Holmes, J.).

[34] "Our conclusion is unaffected by the Tenth Amendment. . . . The amendment states but a truism that all is retained which has not been surrendered." United States v. Darby, 312 U.S. 100, 123–24 (1941).

[35] Some of them, at least, would be particularly reluctant to claim that human rights are reserved to the Congress. Like Senator Bricker, they might insist that Congress could not deal with them either. *But see* Civil Rights Act of 1964, 78 Stat. 241–68 (1964), 28 U.S.C. § 1447(d) (1964), 42 U.S.C. §§ 1971, 1975a-1975d, 2000a–2000h–6 (1964); cases cited note 29 *supra*.

[36] 133 U.S. 258, 267 (1890).

[37] Some even question this limitation. *See* Arms Control, 177 n.30. Other limitations suggested would bar the use of a treaty to abolish a state's militia or destroy its republican form of government. *Id.* at 34–36, 60–61.

[38] Geofroy v. Riggs, 133 U.S. 258, 267 (1890) (emphasis added). The same implication might lie in an earlier sentence in the opinion, where the Court stated: "That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear." *Id.* at 266.

[39] Holden v. Joy, 84 U.S. (17 Wall.) 211, 243 (1872).

[40] Asakura v. Seattle, 265 U.S. 332, 341 (1924).

[41] Santovincenzo v. Egan, 284 U.S. 30, 40 (1931).

Noteworthy for its echoes of Jefferson is Chief Justice Taney's statement in *Holmes v. Jennison:*[42]

> The power to make treaties is given by the Constitution in general terms, without any description of the objects intended to be embraced by it; and, consequently, it was designed to include all those subjects, which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty; and which are consistent with the nature of our institutions, and the distribution of powers between the general and state governments.[43]

Each of these judicial dicta, it should be noted, was made by the Court while upholding an exercise of the treaty power. Each statement was intended to assert the fulness of the treaty power, rather than any limitation upon it. Only the cautious use of "proper," "properly," "usually," and "usually regarded as proper"—each phrase probably echoing those which preceded it—suggests some possible limitation. There is no indication that any of the Justices had one particular qualification in mind, or that they sought to exclude any particular use of the treaty power. No treaty of the United States has been held invalid on the ground that it dealt with an "improper" subject.[44] No treaty has been avoided by the President or rejected by the Senate because its subject matter was not constitutionally "proper" for regulation by treaty.[45] But if we are to give these judicial statements any content, it is not unreasonable to suggest that they might support propositions akin to Jefferson's first two clauses.

How have these alleged limitations fared in the history of the Constitution? The second half of clause (2)—that treaties can deal only with matters that cannot be regulated except by treaty—is ambiguous. If it means that a treaty may deal only with matters on which Congress could not legislate,[46] we are back to Jefferson's fourth principle, which has long been repudiated. Today, surely, it is difficult to conceive of any matter that could not be regulated other than by treaty; any undertaking having effect within the United States could presumably be carried out unilaterally by internal legislation. In practice, the United States has always regulated by treaty those matters which it might have regulated, and did regulate, by legislation as well—the rights of aliens, tariffs, trade, extradition, consular affairs.[47] On the other hand, if Jefferson's limitation would bar only treaties whose entire scheme could be achieved by internal legislation, it would outlaw no treaty entailing mutual obligations. Legislation conditioned on reciprocity might effectively approximate such a treaty,[48] but it would bind neither the United States nor the other nation. Binding common standards of international behavior, whether on human rights or any other subject, cannot be achieved other than by international agreement (or international customary law).

There remains the first half of clause (2)—that the treaty power can regulate only "matters that are usually regulated by treaty." This suggestion is also found in Chief Justice Taney's statement that the treaty power reaches "all those subjects, which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty." [49] Again, the meeting of Taney's dictium, as well as that of Jefferson, is not entirely clear. We do not know whether Jefferson's "matters," or Taney's "subjects," [50] refers to the particular thing dealt with in the treaty (wheat, nuclear weapons), the rights or duties it establishes (quotas and prices, non-use of weapons), or its objectives (trade, peace). If the limitation were taken seriously, would human rights be a new subject of international negotiation? Are human rights a subject different from the traditional rights of aliens? Or are the asserted objects of human rights covenants, friendly relations and international peace, as old as treaties?

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[42] 39 U.S. (14 Pet.) 540 (1840).

[43] *Id.* at 569. The same statement, in slight paraphrase, appears in Holden v. Joy, 84 U.S. (17 Wall.) 211, 243 (1872). In that case Mr. Justice Clifford speaks of "those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiations and treaty, if not inconsistent with the nature of our government and the relation between the States and the United States.' *Id.* (footnote omitted). If Clifford intended to modify Taney, his statement might be read more broadly—a treaty may deal not merely with matters about which nations had negotiated, but also with those they considered proper for negotiation.

[44] *But cf.* Power Authority v. FPC, 247 F.2d 538 (D.C. Cir.), *vacated as moot, sub nom.* American Pub. Power Ass'n. v. Power Authority, 355 U.S. 64 (1957). However, this case was, I believe, wrongly decided. *See* note 65 *infra.*

[45] Early in our history some treaties were rejected because the subject matter was within the domain of Congess and therefore, it was thought, not within the treaty power. *See* Arms Control 172 n.14.

[46] Calhoun, too, said: "A treaty never can legitimately do that which can be done by law; and the converse is also true." 29 Debates and Proceedings in the Congress of the United States 532 (1854).

[47] *See* Q. Wright, The Control of American Foreign Relations § 59 (1922).

[48] *See Law of the Land* 921 n.41 and text accompanying.

[49] Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 569 (1840).

[50] Or Clifford's "objects," Holden v. Joy, 84 U.S. (17 Wall.) 211, 243 (1872).

But such a limitation cannot be taken seriously. Why in law, logic, or good sense, should the United States be barred from negotiating about new subjects, or for objectives not "usually" regulated by treaty? Justice Taney's ambiguous tense is particularly troubling. If the implication is that the United States can deal by treaty only with matters that "had usually been" dealt with by treaty before 1787, it is patently unacceptable. There is as little, or less, reason for limiting the treaty power to those matters about which nations negotiated in the eighteenth century as there is for limiting the commerce power or the war powers to the needs of that era. In fact, the United States has negotiated treaties about subjects, and for objects, that were not dreamed of by the constitutional fathers (or by Taney), including the Charter of the United Nations and the Nuclear Test Ban Treaty.

Jefferson's assertion might mean that the United States cannot negotiate a new kind of treaty. It would not prevent the United States from entering into a treaty of a kind it has never negotiated, after other nations "had" begun "usually" to negotiate about it. Such a constitutional doctrine makes little sense for the country we have become,[51] but it would not, in fact, bar the United States from negotiating with other nations on human rights; nations have been "usually" regulating human rights by treaty at least since the "minorities treaties" of a half-century ago, in the UN Charter, in the various regional human rights arrangements now in effect, and in the human rights covenants that have been under negotiation for almost twenty years under the auspices of the United Nations.[52]

We are left, then, with Jefferson's first limitation—that a treaty "must concern the foreign nation, party to the contract." Jefferson apparently saw this as an inherent characteristic of a treaty, a characteristic which the Constitution incorporated when it spoke of "Treaties." It is not clear what this limitation meant for him, what would be its practical consequences, what kinds of acts or arrangements it would preclude. Perhaps this limitation approximates the one expressed more recently in the now famous remarks made in 1929 by Charles Evans Hughes, erstwhile Secretary of State and already designated Chief Justice of the United States:

> What is the power to make a treaty? What is the object of the power? The normal scope of the power can be found in the appropriate object of the power. The power is to deal with foreign nations with regard to matters of international concern. It is not a power intended to be exercised, it may be assumed, with respect to matters that have no relation to international concerns.
>
> So I come back to the suggestion I made at the start, that this is a sovereign nation; from my point of view the nation has the power to make any agreement whatever in a constitutional manner that relates to the conduct of our international relations, unless there can be found some express prohibition in the Constitution, and I am not aware of any which would in any way detract from the power as I have defined it in connection with our relations with other governments. But if we attempted to use the treaty-making power to deal with matters which did not pertain to our external relations but to control matters which normally and appropriately were within the local jurisdictions of the States, then I again say there might be ground for implying a limitation upon the treaty-making power that it is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty-making power.[53]

Hughes' remarks were extemporaneous, perhaps even impromptu, not a carefully prepared statement of constitutional doctrine.[54] He was setting forth the views which lay behind the position of the American Delegation (led by Hughes) to the Sixth International Conference of American States--that the United States "could not join" in a treaty to establish uniform principles of private international law,[55] a position challenged by some leading international lawyers.[56] A year earlier, in the same forum, Hughes had attempted to justify this position on grounds that smacked of "reserved rights of states," and seemed not to take full account of *Missouri v. Holland*.[57] The 1929 remarks quoted above still retained tenth amendment undertones which the Court that decided *Missouri v. Holland* might have rejected.[58] The new emphasis on "international concern" and "relation to foreign affairs" might also be suspect if these phrases were interpreted to preclude American adherence to a code of private international law.[59]

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[51] "We must consider what this country has become in deciding what that [Tenth] Amendment has reserved." Missouri v. Holland, 252 U.S. 416, 433 (1920).

[52] *See* text accompanying notes 10–11 *supra*.

[53] 23 Proc. Am. Sec'y Int'l L. 194, 195–96 (1929).

[54] He spoke in response to urging from the floor that he express his views. *Id.* at 193.

Still, whatever the origins or context of Hughes' statement, its principal elements have been commonly accepted as sound constitutional doctrine. The *Restatement on the Law of American Foreign Relations* has made Hughes' doctrine (if not Jefferson's) "black letter law." [60] Students are now taught that a treaty would be invalid not only if it were inconsistent with the Bill of Rights or other provisions of the Constitution, but also if it dealt with a matter which was not of "international concern." There has been less agreement on what this limitation means.

II

Whatever Hughes had in mind, the scope of the constitutional limitation he proposed must drive from its constitutional underpinnings and rationale. The doctrine is commonly described as requiring that treaties deal with matters of "international concern." There might have been less confusion if the doctrine had been put forth as a requirement that treaties bear a "relation to American foreign affairs," another phrase which Hughes employed.[61] Whatever phrase is used, the implied constitutional limitation derives from the view that the treaty power is a foreign relations power, and means that treaties must have a foreign relations purpose.

> [55] In view of our system of government in the United States, with our forty-eight states and our federal government of limited powers, the United States could not join in this action, but it viewed with sympathetic interest the efforts of the other American states to obtain legislative uniformity.

Hughes, *The Outlook for Pan Americanism—Some Observations on the Sixth International Conference of American States*, 22 Proc. Am. Soc'y Int'l L. 1, 12 (1928). His comments in subsequent discussion suggest that in his view the United States could not adhere to the Bustamante Code because of a combination of constitutional and political obstacles. *Id.* at 61–62.

The official declaration of the American delegation stated in part:

> The Delegation of the United States of America regrets very much that it is unable at the present time to approve the Code of Dr. Bustamante, as in view of the Constitution of the United States of America, the relations among the states members of the Union and the powers and functions of the Federal Government, it finds it very difficult to do so.

Pan American Union, Treaties and Conventions signed at the Sixth International Conference of American States 36, 6[illegible] ([illegible]).

[56] For example, Professor Manley O. Hudson, 22 Proc. Am. Soc'y Int'l L. 60 (1928), and Charles H. Butler, 23 Proc. Am. Soc'y Int'l L. (1929).

[57] 22 Proc. Am. Soc'y Int'l L. 61–62 (1928); *see* Hudson's remarks, *id.* at 60. It is clear that there was, at that time, a lag in the State Department's appreciation of the implications of *Missouri v. Holland*. *See* note 32 *supra* and note 63 *infra*.

[58] *E.g.*, Hughes' statement: "But if we attempted to use the treaty making power . . . to control matters which normally and appropriately were within the local jurisdiction of the States. . . ." 23 Proc. Am. Soc'y Int'l L. 196 (1929).

[59] In further discussions of the Bustamante Code on private international law during the 1929 Proceedings of the American Society of International Law, Hughes admitted that "doubtless there were many matters considered which were not entirely of local concern," and he recognized, in general, that there may be concerns "which perhaps under former conditions had been entirely local, [but which] had become so related to international matters that an international regulation could not appropriately succeed without embracing the local affairs as well." 23 Proc. Am. Soc'y Int'l L. 195 (1929). But he implied that some aspects of the conflicts enterprise might be of strictly local interest, and that merely to achieve uniformity of practice within different nations might not be a proper subject of a treaty. *Id. But see* note 63 *infra*.

[60] Restatement (Second) of Foreign Relations Law § 117 (1965). I have assumed that Jefferson's statement and Hughes' are generally equivalent. If there is any difference between the requirement that a treaty "concern the other party" and that it be of "international concern," the difference does not seem relevant for our purpose. Suggestions that there are relevant differences between "international concern" and "multi-national concern" are not persuasive. If, as I believe, the justification for any "international concern" limitation derives from the purpose of the treaty power, the real test should be whether a treaty is entered into as an act of foreign policy in pursuance of American foreign relations. *See* note 61 *infra*.

[61] When Hughes spoke of this question after he became Chief Justice he spoke of "all subjects that properly pertain to our foreign relations." Santovincenzo v. Egan, 284 U.S. 30, 40 (1931).

One may conclude, then, that the Constitution would bar some mala fide use of the form of a treaty, in conspiracy with a foreign power, for the sole purpose of making domestic law in the United States—whether to exclude the House of Representatives or to invade the reserved jurisdiction of the states. Assume the President (and Senate) wish to establish a uniform divorce law in the United States; a friendly foreign government agrees to help by entering into a "treaty" with the United States establishing a divorce law for this country. It would be simple in that case to declare the label of treaty a sham, to disregard the formalities of treaty-making, and to declare that "treaty" inoperative as law in the United States. Such a hypothetical conspiracy apart, it is difficult to imagine the circumstances in which the United States and one or more nations would negotiate and conclude a treaty that does not concern them both, that does not involve the foreign relations of the United States, and that does not serve its foreign policy.[62] Hughes' concern, and Jefferson's, then, may be largely academic. Surely, there is no warrant for extending and distorting the constitutional doctrine they suggest merely to render it less academic and make it a serious limitation.

In any event, Hughes' doubts about a treaty on private international law in 1928 or 1929 have little relevance for human rights conventions today. What is of international concern, what affects American foreign relations and is relevant to American foreign policy, what matters the United States wishes to negotiate about, differ from generation to generation, perhaps from year to year, with the everchanging character of relations between nations.[63] If there is a constitutional requirement that a treaty deal with a matter of "international concern," that it be an act of American foreign policy in the conduct of American foreign relations, surely human rights conventions today amply satisfy that requirement. Minimum standards of international behavior with regard to human rights were a matter of international concern and involved American foreign relations long before the UN Charter expressly so provided. Questions of human rights, and the desirability of international legislation of minimum standards, are issues of foreign policy facing all nations today. None of them is asserting that it is not an appropriate subject for international agreement. For the United States such agreements are not "sham" treaties contrived by the President to distort our constitutional system of separation of powers, or to take additional matters from the jurisdiction of the states into the federal domain.[64] As in all bona fide treaties, their purpose, from the point of view of the United States, is a foreign relations purpose—to influence behavior of other countries which affects the welfare of this country. The concern of the United States is not wholly moral or humanitarian. This country would like to see minimum standards observed in other countries in order to safeguard our own standards and to promote conditions that are conducive to American prosperity and American interests in international peace and security. To achieve those aims, and to give the United States the right to request compliance with those standards, the United States is prepared to pay the price of undertaking to apply similar standards at home and to recognize the right of other nations to demand American compliance.

It should be clear, moreover, that nothing in the requirement that a treaty deal with a matter of "international concern," or that it "affect American foreign relations," bars an agreement in which the United States undertakes obligations to other states as to how it will treat its own inhabitants:

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[62] Even the case that inspired Hughes' concern hardly affords a realistic example. Theoretically, his principle might bar treaties which develop "uniform laws" where neither the United States nor the other party has any substantial interest in whether or not their countries have such uniform laws. But even if nations should bother to have their experts join to develop those uniform laws, they would hardly incorporate such laws in a treaty unless they had some foreign policy interest in common standards, in binding other nations to these standards, and were willing to bind themselves in exchange. *But see* note 63 *infra.* For a discussion of some different kinds of concerns that may lead nations to negotiate a treaty or include a particular provision, see *Niagara Reservation* 1164–69.

[63] The agreement that troubled Hughes affords an interesting instance. Whatever might have been the case in 1928, I am confident that today a treaty providing for uniform principles of private international law in regard to cases of conflicts of law between nations would be a valid treaty dealing with a matter of international concern. In recent years the United States has adhered to the Hague Conference on Private International Law. Today, principles of conflicts of law between nations are probably subject to federal, not state, law, precisely because they affect the foreign relations of the United States. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425–26 (1964); Henkin, *The Foreign Affairs Power of the Federal Courts:* Sabbatino, 64 Colum. L. Rev. 805, 820–21 n.51 (1964).

[64] In most respects, at least, the subjects with which such treaties generally deal are already in the federal domain, and do not make new law, but only confirm what is already federal law. *See* note 66 *infra.*

> [I]t has always been clear that international agreements, like private contracts, may be parallel as well as reciprocal. Parties may bind themselves to do, or not to do, for each other; or, a nation may undertake to do or not to do, in its own land and to its own people, in consideration of a similar undertaking by the other party. . . .
>
> Such agreements are not entirely recent phenomena. . . . In fact, the United States, like other nations, has itself negotiated treaties and other international agreements which regulate acts of the Government in regard to its own citizens. The United States adhered to ILO Conventions establishing labor standards which this country would apply to Americans. It agreed to control raw and manufactured opium and other drugs within the United States. It agreed to apply to its own vessels accepted load lines and common standards for safety at sea. It agreed not to bring to trial an American soldier if he had been tried for the same offense by the courts of an allied NATO country. It agreed with other nations to limit its taxes on American citizens. And the United States has agreed to limit its own armaments; it continues to strive for far-reaching controls on arms and armies which would impose strict limitations on activities by Americans within the United States; it sought, for years, agreement for the control of atomic energy which would have governed strictly many domestic activities by Americans in the United States.[65]

The foreign relations aspects of these "parallel" agreements are obvious, and the international character of human rights conventions should be equally apparent. An international convention fixing high labor standards for a nation's own inhabitants, adopted by the nations with whom the United States competes in the sale of manufactured goods in world markets, would have a greater impact on American foreign trade, and be of far greater "international concern" to this country, than any "parallel" treaty formulating common shipping standards and restrictions. To recognize that even human rights may be matters of authentic restrictions concern, one need only think of apartheid in South Africa, of recent events in communist countries, in Nigeria, in India and Pakistan, in Cyprus, and of other actual or potential situations where the treatment of individuals or minority groups is intimately related to war and peace among nations.[66] Basically, the question is not whether the United States should legislate for its own citizens by treaty, or should submit actions in the United States to the scrutiny of other nations. Rather, the question is whether the United States, concerned with the treatment of individuals in other countries and its effect on international peace and security, may seek to regulate such treatment, and thinks it worth the necessary price—agreement to subject actions in this country to similar international or foreign scrutiny.

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[65] *Law of the Land* 911–12 (footnotes omitted).

Opponents of human rights conventions have also invoked Power Authority v. FPC, 247 F.2d 538 (D.C. Cir.), *vacated as moot, sub nom.* American Pub. Power Ass'n v. Power Authority, 355 U.S. 64 (1957). That case, I believe, was wrongly decided. *See Niagara Reservation, passim.* In any event, it has no relevance to our question. That case held a Senate reservation to a treaty with Canada, providing that the treaty would not go into effect in the United States until Congress adopted legislation, did not have the effect of law in the United States since it was not part of the contract with Canada. That case suggests that only provisions that are "contractual," *i.e.*, part of the agreement with the foreign nation, can be law of the land. Nothing in that case suggests any limitations on the kinds of provisions that can be made subject of a contract with other nations. In a human rights convention, the provisions are "contractual," imposing obligations upon the parties.

The majority opinion in the case adopted the views of Professor Jessup, counsel for the Power Authority in the case, and author of a legal memorandum published earlier on the same issues. Professor Jessup has been one of the leading exponents of the position which would have the individual a subject of international law, and has expressly favored multilateral conventions to promote human rights. P. Jessup, A Modern Law of Nations 87–93 (1948).

[66] Even minor agreements have a foreign relations purpose. In 1963 President Kennedy asked the advice and consent of the Senate to three United Nations conventions dealing with the abolition of slavery, the abolition of forced labor, and the enforcement of political rights of women. He said:

> United States law is, of course, already in conformity with these conventions, and ratification would not require any change in our domestic legislation. However, the fact that our Constitution already assures us of these rights does not entitle us to stand aloof from documents which project our own heritage on an international scale. The day-to-day unfolding of events makes it ever clearer that our own welfare is interrelated with the rights and freedoms assured the peoples of other nations.
>
> These conventions deal with human rights which may not yet be secure in other countries; they have provided models for the drafters of constitutions and laws in newly independent nations; and they have influenced the policies of governments preparing to accede to them. Thus, they involve current problems in many countries.
>
> They will stand as a sharp reminder of world opinion to all who may seek to violate the human rights they define. They also serve as a continuous commitment to respect these rights. There is no society so advanced that it no longer needs periodic recommitment to human rights.
>
> The United States cannot afford to renounce responsibility for support of the very fundamentals which distinguish our concept of government from all forms of tyranny.

Hearings on Human Rights Conventions Before a Subcomm. of the Senate Comm. on Foreign Relations, 90th Cong., 1st Sess. 40 (1967).

To suggest that human rights conventions are not of "international concern" or do not "affect American foreign relations" requires some special and narrow restriction of the natural meaning of those phrases. It necessitates a new doctrine holding that a treaty must affect American foreign relations in a particular way, that it further only certain kinds of foreign relations interests, and further them only in specific ways. I know of no basis for any such limitation on the treaty power: Jefferson did not suggest it; Hughes' remarks have no suspicion of it; none of the dicta of the Court states or implies it. No one during the Bricker controversy, on either side, ever intimated it; indeed, such a constitutional doctrine would have made Senator Bricker's struggles to amend the Constitution largely unnecessary, legally as well as politically. Most important, there is no basis for any such limitation on the treaty power in the only possible foundation for any such limitation—the requirement that a treaty be a bona fide agreement in pursuit of foreign policy objectives.

Perhaps some of the misunderstanding of "international concern" and "relation to American foreign policy" has resulted because some have confused that doctrine with the very different concept of "domestic jurisdiction." In part, responsibility for this confusion may be traced to the original Circular 175,[67] promulgated by Secretary of State Dulles apparently in an effort to console the Bricker forces after the defeat of their efforts to amend the Constitution.[68] The Circular—an instruction to the State Department—provided:

> Treaties should be designed to promote United States interests by securing action by foreign governments in a way deemed advantageous to the United States. Treaties are not to be used as a device for the purpose of effecting internal social changes or to try to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern.[69]

The Circular, it should be noted, announced policy, not constitutional doctrine. Indeed, it was probably designed to impose as policy what the Bricker Amendment would have imposed as constitutional law, but which, it was realized, was not the law of the Constitution unamended.[70] Still, the final clause of the Circular has apparently led some to argue that the Constitution precludes American adherence to any treaty that deals with matters "that are essentially within the domestic jurisdiction of the United States." [71]

Whatever its intellectual origins, the argument reflects fundamental misconceptions. The concept of "domestic jurisdiction" is unknown to American constitutional doctrine; it is well known to international law.[72] Under international law, a matter is deemed to be within a country's domestic jurisdiction if it is not governed by international law or by any treaty obligation.[73] What is within the domestic jurisdiction of a country in the absence of treaty ceases to be so when that nation enters an international agreement on the subject.[74] To suggest that the Constitution forbids treaties as to matters that are "essentially within the domestic jurisdiction of the United States," is to bar any treaty on any matter not already governed by customary international law or previous agreement. Such a theory would prevent the United States from participating in the development of new law by multilateral convention—the principal form of international legislation today. It would preclude many provisions in treaties of commerce, friendship and navigation, in treaties on disarmament, extradition, nationality the prevention of double taxation and a host of other subjects. It seems patently absurd.[75] In any event, it is a limitation which no one has suggested before and which is without foundation. It cannot be implied in Hughes' "international concern" limitation, nor can it be derived from the character and purpose of the treaty power as an instrument of foreign relations; it has no support even in early writings on the Constitution; and it is contradicted by the history of American treaty practice. In the absence of treaty, this country's armaments, its nationality laws, its immigration policies, all lie within its "domestic jurisdiction;" yet the United States has negotiated agreements on these subjects of international concern from the beginning of its history to this day.

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[67] U.S. Dep't of State, Dep't Cir. No. 175 (1955), reprinted in 50 Am. J. Int'l L. 784 (1956).

[68] For other reassurances to the Brickerites, see *Law of the Land* 934–35 n. 66.

[69] U.S. Dep't of State, Dep't Cir. No. 175 at 2 (1955). The Circular, in turn, echoes remarks made by Dulles two years earlier during the hearings on the Bricker Amendment. See *Hearings on S.J. Res. 1 and S.J. Res. 43 Before a Subcomm. of the Senate Comm. on the Judiciary*, 83d Cong. 1st Sess. 824–25 (1953). The circular has since been revised and the quoted language eliminated.

[70] In fact, when President Kennedy in 1963 sent three minor human rights conventions to the Senate, *see* note 66 *supra*, it did eventually consent to one of them. 113 Cong. Rec. 15750–51 (daily ed. Nov. 2, 1967) (consent to convention on abolition of slavery).

[71] American Bar Association, *Report of the Standing Committee on Peace and Law Through United Nations: Human Rights Conventions and Recommendations*, 1 Int'l Law. 600, 601 (1967). Note that the Circular, *supra* note 69, speaks of "domestic concern," not of "domestic jurisdiction." The latter has became a term of art in international law; the former has not. *See* notes 72–74 *infra* and accompanying text. The Circular may have intended to use "domestic concern" in contradisdinction to Hughes' "international concern." I fact, this is a misleading play on words. "Domestic concern" and "international concern" are not closed, exclusive categories. To say that something is essentially a matter of domestic concern may be merely a way of expressing a determination not to negotiate about it. But what is essentially a matter of "domestic concern" becomes a matter of "international concern" if nations do, in fact, decide to bargain about it. *See* note 75 *infra*.

[72] *Compare* U.N. Charter art. 2, para. 7, *with* Declaration on the Part of the United States, 61 Stat. 1218 (1946), T.I.A.S. No. 1598 (promulgated Aug. 14, 1946), in which the United States accepted, with reservations, compulsory jurisdiction of the International Court of Justice under I.C.J. Stat. art 36, para. 2. One of the stipulated exceptions related to ". . . disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America. . . ." Declaration on the Part of the United States, *supra*.

[73] *See, e.g.*, Declaration on the Part of the United States, 61 Stat. 1218 (1946), T.I.A.S. No. 1598 (promulgated Aug. 14, 1946).

III

Today, human rights are of deep "international concern"; they have an important place in the foreign relations of the United States. Human rights in other countries have become, ineluctably, this country's business. It has repeatedly joined with other nations to condemn invasions of human rights in communist countries as well as in South Africa. For the United States to insist that a nation's treatment of its own inhabitants is not of international concern would itself have grievous impact on American foreign relations with Asian and African countries. The state of human rights in the United States, in turn, is sharply scrutinized by others, and our domestic human rights policies are developed with at least one eye and one ear to the world outside. For decades now, "in the ordinary intercourse of nations," human rights have "been made subjects of negotiation and treaty." Surely, the Constitution does not prohibit the United States from negotiating and adhering to such treaties.

Beneath the "neo-Bricker" doctrine that would deny the United States the power to adhere to such treaties lies, perhaps, the view that the United States should not be negotiating with other nations on "internal matters," whether those of South Africa, Russia, Hitler's Germany, Castro's Cuba, or the United States. That is a view of foreign relations which this country rejected almost 100 years ago. Today such a foreign policy is impossible, even were it desirable. The United States cannot avoid involvement in such "internal affairs" of other countries and it cannot keep other nations out of ours. The price of international influence and concern is reciprocity. Indeed, the price of United States leadership in world affairs may involve our own "internal affairs" in our foreign relations even more than the "internal affairs" of others.

Constitutional interpretation has, for more than thirty years, favored the broadest construction of the power to govern. The Supreme Court long ago recognized that where power is granted it may be exercised to the fullest. No court today would say that the commerce power is limited to matters which affect commerce in one particular way or to a limited degree; indeed, it has been extended farther than ever to support new departures in human rights legislation in the United States.[76] The spending power has emerged as a principal instrument for promoting general welfare, including much that comes within contemporary conceptions of human rights.[77] A hundred years after its adoption, the fourteenth amendment is being read to warrant novel and far-reaching legislation to promote human rights in the United States.[78] It is difficult to believe that any court would insist on a more grudging and niggardly view of the treaty power in order to prohibit American participation in human rights conventions. It is difficult to believe that any court would find that the Constitution renders the United States impotent to do what all other nations can do—participate in one of the major developments of international life in the last half-century. It is difficult to believe that any court would find in the Constitution a requirement that treaties deal with matters of "international concern," or "affect the foreign relations" of the United States, in some special narrow sense unrelated to the realities of international intercourse today.

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[74] *See* Advisory Opinion on Nationality Decrees Issued in Tunis and Morocco, [1923] P.C.I.J. ser. B, No. 4.

[75] The authors of this argument might insist that they are using "domestic jurisdiction" in some special sense. I do not know what it is. It would seem that they are trying by this phrase to read back into the Constitution the notion that a treaty may not deal with a "local matter"—a notion long rejected and finally demolished in *Missouri v. Holland*. The point is that the concept of "domestic jurisdiction" is irrelevant to the constitutional question whether an agreement relates to our foreign relations and has some foreign policy purpose.

[76] *E.g., Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

[77] *See, e.g., Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937).

There is room for difference about the desirability or effectiveness of international human rights covenants, or of American participation in such covenants. There is, however, no excuse for lawyers to fabricate constitutional doctrine to confuse the issue. Almost ten years ago, in the pages of this *Review*, I wrote:

> Many will have deep sympathy for those who dream of old days thought good, or better; who yearn for decentralization even in foreign affairs and matters of international concern, for limitations on federal power, for increase in the importance of the States; who thrill to a wild, poignant, romantic wish to turn back all the clocks, to unlearn the learnings, until the atom is unsplit, weapons unforged, oceans unnarrowed, the Civil War unfought. The wish remains idle, and the effort to diminish power in this area for fear that it may not be used wisely is quixotic, if not suicidal. It is not the moment to attempt it when all ability, flexibility, wisdom are needed for cooperation for survival by a frightened race, on a diminishing earth, reaching the moon.[79]

The lesson is more urgent than ever; it is yet to be learned.

The CHAIRMAN. Senator Proxmire, thank you very much, indeed.

You and I have been characterized and portrayed in some accounts as secretly plotting to "sneak" the Genocide Convention through the Senate at the end of this session when no one really is looking.

Now we have used the end of sessions together on occasion, at Christmastime. We found it a very appropriate time to debate at length some measures that would have rushed through: the SST or the ABM. I think we found it propitious at that time to speak at length, and we found our brethren anxious to get home.

Do you believe there is any procedure in the Senate that would allow you or me to plot to slip this through the Senate sometime when no one is looking?

Senator PROXMIRE. No way. I am sure, Mr. Chairman, that you are aware of the fact that the treaty would require, of course, a two-thirds vote of our full body. There may have been a time some years ago when a treaty was passed without a rollcall vote. But certainly, with the very strong opposition of the distinguished Senator from North Carolina and the Senator from South Carolina, who is the chairman of the Judiciary Committee, who expressed themselves this morning, I know this treaty will be discussed and debated in full—and I do mean in full. We are going to have an up and down vote on it.

There is no question about it. There is no way this is going to be sneaked through. Indeed, there is no intention on the part of anybody to do it. We couldn't do it, even if we wanted to.

The CHAIRMAN. I don't want to be personal about this, but I do think we should look at the kind of campaign that is going to be used against the issue. We have seen it in the past, and we see evidence of it again.

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[78] *E.g., Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). *See also United States* v. *Guest*, 383 U.S. 745 (1966).

[79] *Law of the Land* 936.

Here is a publication called Spotlight, [indicating] which is headlined "Ultraliberals Again Pushing Genocide Treaty in Congress." I notice that they have a picture of Harry Truman and Chuck Percy on the first page. I don't know whether Harry Truman is depicted as an ultraliberal. There is also a picture of Sam Ervin in the newsletter.

You and I were both mentioned in this, and I don't quite know how they characterize an ultraliberal. You and I sat with Wallace Bennett, hardly an ultraliberal, on the Banking Committee for years. We sat side by side with him. I remember a speech he gave on the floor of the Senate about how conservative I was for 6 years with him on the Banking Committee. I also notice that I was rated No. 1 for supporting the Reagan administration this year, out of 100 Senators.

This kind of attempt to use emotional words like "ultraliberals" as thought we were "radic-libs" I had thought was over. In the past there were simplistic approaches of labeling people in this way, impugning their motives and suggesting that they are trying to undercut the Constitution of the United States.

How do you react to that? Do you pay any attention to it?

Senator PROXMIRE. Is this the Liberty Lobby that you are citing here?

The CHAIRMAN. Pardon?

Senator PROXMIRE. Is this the Liberty Lobby?

The CHAIRMAN. The newsletter is called Spotlight.

Senator PROXMIRE. Yes; that is put out by Liberty Lobby, I think. If I am wrong, I will correct the record on this.

The CHAIRMAN. Liberty Lobby is here in the room now and will testify shortly.

I met a very lovely young woman from there just this morning.

Senator PROXMIRE. The Liberty Lobby made a very kind and generous statement about me. They interviewed me on this. They said that I was one of their favorite Senators, that I agreed with them on most things.

But, on this issue, the Genocide Treaty, I disagree.

So, I think it hardly can be said that they view my position as one of an ultraliberal.

As you know, you and I agree about trying to hold down spending and on a lot of other issues that are not regarded as "ultraliberal."

The CHAIRMAN. Well, what I hope is that we are not going to have a hysterical campaign on this issue. Let it be historical, but not hysterical. Let's try to get down to the issues the way you have and the way Strom Thurmond has this morning. I think all of the opening statements were unemotional and rational.

This is something we can rationalize and think through. I think you have contributed to this in your testimony this morning.

Senator BOSCHWITZ. You may be expecting too much, Mr. Chairman.

The CHAIRMAN. Oh, you can always hope.

Senator BOSCHWITZ. You are quite right, but I am afraid that this is not an issue which will be rationally approached and rationally thought through.

The CHAIRMAN. Well, let's hope it is. It will be in the committee and we hope it will be conducted rationally on the floor of the Senate. I think certainly the Senators who have appeared this morning, their comments, whether on one side or the other of the issue, have been rational, and I hope our whole discussion will be rational.

I am sure, however, that all of the rules of the Senate will be used on both sides. We can expect that. There is no chance that we are going to try to put this on the floor this year, though I see no reason why it can't be moved to the floor some time next year.

Senator Pell.

Senator PELL. Thank you, Mr. Chairman.

First, I would like to congratulate the senior Senator from Wisconsin for the work that he has done over the years. Liberty Lobby quotes me as saying that I have been continuously impressed because Senator Proxmire has "kept all of our feet to the fire on this issue over the years." I am so glad that he has, and am delighted that Liberty Lobby picked up that quotation. The senior Senator from Wisconsin should feel very complimented.

In connection with the treaty itself, I think probably the best thing that we as Senators can do is to send a copy of the treaty to those who disagree with us on it. I am not sure, from the mail that I have seen, that the people who write in as opposing the treaty, having been stirred up by a variety of groups across the length and breadth of our Nation, have read the treaty or understand it. The key phrase in it is in article VI, which says that nobody can be tried in an international tribunal unless the contracting party "shall have accepted its jurisdiction."

So, this treaty is a two-stage thing. One stage is the general question of taking action against genocide. The second is if we wish to do so, we can accept the jurisdiction of the World Court or some other body. But these are not the same thing.

The thought that goes through my mind is perhaps it would be a good idea if we had some amendment or understanding to the effect that such jurisdiction would not be accepted by the United States in the foreseeable future; and if it were to be accepted, it would require the same two-thirds vote as passage of the treaty.

What would be your reaction to trying to work out some understanding along that line? I would think this would completely gut the opposition argument.

Senator PROXMIRE. I agree wholeheartedly with that. It is my recollection that this was the understanding that was offered before. I would think it would be appropriate.

There is just no question in my mind that there is no way that this treaty or any treaty will overrule the Constitution of the United States. The Supreme Court has made that very clear. In fact, the treaty will not overrule a law passed by the Federal Government. It does overrule the law of a State, however, because the Federal Government affirms the treaty.

This should be very clear to all of us. We are not acting now in a way that would revise the law of our country.

Furthermore, we have to have separate implementing legislation, and this implementing legislation has to be acted upon, as was indicated by Senator Helms earlier today, by both the House and the Senate. That implementing legislation will determine the extent to which our Americans will be subject to any jurisdiction. I am positive that we would take the position that Americans would be tried for genocide, if they are tried, in American courts and with American constitutional protections.

Senator PELL. One thought might be if there is a declaration added at the time that we pass it—hoping that we do—it could read:

> That the U.S. Government declares it is not hereby accepting the jurisdiction of any international penal tribunal, nor does it intend to do so in the future should any such tribunal ever be created.

I would think something along those lines would counter the argument that has been presented.

Incidentally, in connection with the point you made about treaty law and Federal law, my understanding is that they are both considered equal; hence the one that is the most current would prevail. Wouldn't that be correct?

Senator PROXMIRE. Well, perhaps you are right. But the research that my staff has done indicates that Supreme Court decisions on a number of occasions consistently have indicated that the Constitution would be supreme and that the treaty would not replace Federal law passed by the Federal Government, as distinguished from State law.

Senator PELL. I do not want to argue against your and my position, but my understanding always has been that the provision that is the most current is the one that would prevail; hence, if a treaty is signed, until some other law is passed in violation of that treaty, or saying something different than the treaty, the treaty law would prevail. I think that is correct.

Senator PROXMIRE. I understand that the way you have stated it is correct. I think that the way Senator Thurmond stated it was correct. What he said, however, was that a future administration or a future Congress could make Americans subject to an international tribunal.

Why we cannot affect that. That is up to future Congresses and future Presidents. We would not try to bind them. They can do anything they want. All we can do is to act within our present capacity. It would be my recommendation and understanding that we could have an understanding of the kind that the Senator from Rhode Island has suggested or that we could make the point clear in the implementing legislation.

Senator PELL. Good. That would be my hope, too. I thank you very much for all you have done in this regard.

The CHAIRMAN. It might be well at this point to put on the record the judgment of legal counsel for the committee. The need to pass implementing legislation is clearly involved in this treaty. The treaty does not become effective upon enactment. Implementing legislation must be enacted. That is what I wanted to ask Senator Strom Thurmond about. If the Senate did adopt the treaty—and I will ask Senator Thurmond this question—will the Judiciary Committee go ahead with the implementing legislation? The treaty itself is not self-executing. Also, treaties do have the same status as Federal statutes. They override prior statutes or treaties, as well as inconsistent State laws.

Senator Boschwitz.

Senator BOSCHWITZ. I have no comments other than the comments that I made prior to the Senator's arrival.

Thank you.

The CHAIRMAN. Thank you.

I have one last question for you, Senator Proxmire. Because of your devotion to this particular issue, have you done any head counting at all in the new Senate? Since 1974 we have instituted a new provision on cloture, and it has gone from two-thirds to three-fifths. Do you feel there is a better chance to achieve cloture now? There undoubtedly will be a filibuster on this issue. Do you think there is a chance for this new Senate to override the filibuster and adopt cloture?

Senator PROXMIRE. In 1979, Mr. Chairman, after the 1978 election, I went around and talked to a number of Senators who had been opposed to the treaty in the past. I got the distinct impression that we would have no trouble invoking cloture.

The situation has changed now, and I have not yet had an opportunity to talk to the Senators who were newly elected.

Frankly, I think the administration will play a very important role in this.

The CHAIRMAN. I think so, too.

Senator PROXMIRE. I am very hopeful that the administration will support the treaty. If it does, I think that can make a big difference. But I think we have a good, strong, fighting chance in any event.

The CHAIRMAN. I think it will make all the difference, really.

Senator Dodd.

Senator DODD. Thank you, Mr. Chairman. I will be brief.

First, I give my compliments to the distinguished witnesses.

I recall vividly my first week in the U.S. Senate, about 10 months ago, and the very first U.S. Senator who approached me on any matter whatsoever was the distinguished Senator from Wisconsin. He approached me on the floor and asked me what I thought we could do about the Genocide Treaty. I believe I told him that I thought we had a good chance to hold some hearings this year and that I hoped we would be able to get the treaty ratified.

I am delighted that we are having this hearing. My hope is if not before this session ends, then, at least, in the next session one of the very first matters that we will take up will be the Genocide Convention.

The Senator already has pointed out a couple of things. One of the things that struck me is that by not ratifying this treaty we are actually doing ourselves and American citizens far more potential damage than we would by ratifying it. I would like the Senators to correct me if I am wrong. But I believe we have no authority whatsoever to stop any 1 of the 90 nations who have ratified the Genocide Treaty from punishing an American citizen charged with genocide. We have no jurisdiction whatsoever. By ratifying the Genocide Convention, in fact, we can exercise the right of extradition, to have an American citizen charged in another country with the crime of genocide returned to the United States.

So, in effect, we are not gaining anything at all, and we are doing more damage to ourselves by not ratifying the treaty because of the fact that we cannot preclude a conviction in another nation that already has ratified the convention.

Is that not correct?

Senator PROXMIRE. Senator Dodd, I think you raise a fascinating point, and think you are correct. I am not positive on this. I think it would be a good question to ask the American Bar Association experts and others who will testify. But I do think that is right.

We suffer no increased vulnerability, certainly, by ratifying the convention.

Senator **Dodd**. That is my point.

Senator **Proxmire**. It may be, as you point out, that we would provide an element of protection for American citizens. The fact is that every major country in the world, every important country, including all of our NATO allies, has ratified the convention. We are virtually alone among the developed major countries in not acting. Because of the fact that they have ratified the Genocide Treaty, I presume they could proceed as you described. If an American citizen, for example, were within their borders, and therefore within their control, there could be that vulnerability. I cannot see how that vulnerability would in any way be increased, and it might be very well reduced, as you point out, if we ratify the convention and assert our insistence that American citizens be tried in this country, and so on.

Senator **Dodd**. I will pursue that question with the bar association and other witnesses because my analysis and my staff's analysis is that we are doing more damage to American citizens by allowing them to be tried in a jurisdiction that may not follow the same principles of jurisprudence that we have in this Nation. We would be doing them damage, in fact.

Also, as the chairman has pointed out, this is not a self-executing treaty. I gather you agree with that statement.

Senator **Proxmire**. I do.

Senator **Dodd**. It would require implementing legislation by the U.S. Congress.

Senator **Proxmire**. It is interesting that implementing legislation would have to go to the committee chaired by the distinguished Senator from South Carolina. So there is no question that it would be painstakingly reviewed and very, very carefully considered and challenged.

Senator **Dodd**. To reinforce my first point, are you aware of any behavior included under the convention that is not already prohibited under American domestic law?

Senator **Proxmire**. I don't know of any. I think this is another reason, as I pointed out in my statement, why the likelihood of genocide occurring in another free nation, a Western nation, is very small today. It is in totalitarian and other such countries where it is more likely to occur.

As you point out so well, this is not making this country's citizens more vulnerable. It would make them less vulnerable and it would also permit us to be an effective force in fighting for human rights.

Senator **Dodd**. I guess the only other point is to respond to those who have raised the constitutional issue. I presume it has been discussed before. Article I, section 8, clause 10, of the Constitution says, "The Congress shall have power to define and punish offenses against the law of nations." While the framers of the Constitution may not have specifically had the Genocide Convention in mind they certainly had in mind that we should have the authority to take part in the development of the law of nations, particularly when involving a matter such as this.

I am sure this would be debated at great length in the courts if anyone should take it to court.

I want to thank you, Senator Proxmire.

I woke up this morning to "Mutual News" at 7 a.m., which pointed out that the distinguished Senator from Wisconsin had at least 2,500 times since 1967 raised the issue of the Genocide Convention on the floor of the U.S. Senate. It stated that this hearing today was going to give him an opportunity to once more bring our attention and concern to this issue.

I thank you.

Senator PROXMIRE. Thank you.

The CHAIRMAN. Senator Dodd, thank you very much.

Thank you, Senator Proxmire for your presence today.

Senator PROXMIRE. Thank you, Mr. Chairman.

The CHAIRMAN. I understand that Ambassador Gardner must leave at 12:15, but I understand also that Senator Javits' testimony will be brief.

We are so very honored and pleased to have our former colleague with us today.

Senator BOSCHWITZ. I am going to have to apologize to Senator Javits. I will have to leave in just a few minutes.

So, if I get up in the middle of your testimony, Senator, please forgive me. I will be back later. I have a meeting at 11:30 that I cannot avoid.

The CHAIRMAN. Senator Javits, please proceed as you wish.

STATEMENT OF HON. JACOB JAVITS, A FORMER U.S. SENATOR FROM NEW YORK, ACCOMPANIED BY ALBERT A. LAKELAND, JR., FORMER MINORITY STAFF DIRECTOR, SENATE COMMITTEE ON FOREIGN RELATIONS

Senator JAVITS. Thank you. I will do my best to be brief.

Mr. Chairman, thank you very much for calling me. My thanks also go to Richard Gardner, our former Ambassador to Italy, for yielding to me. I thank the members of the committee for staying to listen.

My hero, too, as has been said here time and again, is Bill Proxmire. I have told him so a good part of those 2,500 times on the floor of the Senate, and I am delighted to repeat it here. It is a signal service that he has rendered to the Nation and to decency in the world by his persistent, unique, and long-continued insistence that this is the path of justice. And, so long as he has a voice to be expressed here, this is what he wants our country to stand for: Justice—simple, elementary justice, according to the Old Testament, the New Testament, and just about every other documentation of religious philosophy that recorded wisdom has ever shown.

Our country finds itself in an anomaly. We are taking all the raps in this field.

What is human rights about? In the ultimate, it is the same thing. As Bill has said, there is no more precious right than the right to live.

And yet, the incarnation of the termination, that it shall never happen again, and that never again will mankind be silent or powerless in the face of such a thing as the Holocaust, is not necessarily assured or guaranteed by anybody or anything. And the efforts to bring it into law were surrounded with such care that we lawyers reversed our position—think of it, reversed our position—after 26 years. We waited it out, and now the American Bar Association is for this convention and not against it. At one stroke it nullified every legal argument made here: on the Constitution, on extradition, on the power of the Congress, on implementing legislation, on trial in foreign courts, on denial of constitutional process, et cetera. What is the use of arguing all those old sores? They are done.

The arch opponent of them all, the ABA, has now changed and we come from a minus to a plus in terms of ratification of this treaty.

We had to go through the ridiculous gyration of distinguishing between totalitarianism and authoritarianism, whatever that means, in order to give a remote coloration to our views and our policies on human rights.

We should have some shred of dignity left and some claim to doing what no great nation can ever do—bluff. Great nations cannot bluff. Yet we are trying it in this field.

So, it is with a deep sense of shame—shame—that we must confess that after all these years we still hear the echoes of the same cries of prejudice, discrimination, and misrepresentation of what the treaty says and what it does. It is very hard to believe that this is so deep that it cannot be exorcised where it exists.

Now, we did not come very far from winning last time. We had 55 votes. Today it would take 60 for cloture. We had it on two occasions when Senator Mansfield took down the bill. He promised me, and it was thoroughly aired on the floor of the Senate time and again, that if I could produce in writing 60 votes, he would put the treaty on again for consideration.

The Foreign Relations Committee opened the door to that because I said that I could not get the 60 unless there were an imminent likelihood of the measure being called up. So, in deference to that desire to forward the matter, this committee reported out this treaty four times.

I personally have urged Senator Proxmire, with his very great influence in this matter, and, for what it is worth, mine, to urge Senator Percy to try again. I think it is a signal tribute to Senator Percy, a dear friend as well as a dear colleague, that he has tried it again, even though he could easily end up with egg on his face. That is not easy for the chairman of such a distinguished committee. You are bound to have such things happen anyhow, but you don't look for them. I think the country ought carefully to note this fact.

So, it is simply a matter of our Nation realizing that in this great storm of revolutionary change, there are some truths that still persist. When the world has within its hands the ability to make one come true, it seems so sad that we just can't do it.

I hope, Mr. Chairman, that we will persist. I hope the committee will report this, and I hope that it will move President Reagan to support this. That's where it is, of course; that's where it is. We are so close that an administration policy for this treaty, or a policy of some other administration for this treaty is what it will take to get it ratified.

Then, Mr. Chairman, nothing will happen. Nothing at all will happen, except that the honor of our country will have been sustained.

Thank you.

The CHAIRMAN. Thank you very much, Senator Javits.

I would like everyone in this room to know that I did not see a note in front of Senator Javits all this while. He did not look at a thing. He just spoke right from the heart. That is so very characteristic of him.

We want to recognize, also, the presence of a former distinguished member of our staff and a very strong friend of ours, including you, Senator Javits, Pete Lakeland. We are honored to have you here with us today, too, Pete.

Mr. LAKELAND. Thank you.

The CHAIRMAN. You mentioned the ABA's position, which did change in 1976. I agree that this makes a dramatic change in the course of events. The ABA debated and deliberated this at great length and came to a solemn conclusion.

I have not had a chance to look at the ABA testimony yet as it came in only this morning. Do you happen to know offhand what the history of this has been with the ABA and what brought that organization to reverse its position on the treaty?

Senator JAVITS. We have a printed copy of the last report of this committee, dated 1976, reported by direction of the committee by Hubert Humphrey. Its date is April 29, 1976. At the bottom of page 4 there is a rundown of the Bar Association and its meetings and so on, with suitable credit for Bruno Bitker, as he so richly deserves. His name already has been mentioned today. It reviews the long fight within the committee and showed that the committee changed its position upon action of its House of Delegates, which previously had disapproved the treaty for many of the reasons testified to here earlier this morning.

But the American Bar Association is entitled to enormous congratulations for facing the issues. I might say that among the most proud words to me which anyone can utter, especially in public life, are the words "I am persuaded." Certainly we have that from the American Bar Association.

The CHAIRMAN. Thank you very much, Senator Javits.

Senator Pell.

Senator PELL. I want to say that I am deeply touched and moved by my old friend, a particularly close personal friend and colleague, being with us today. I think he knows how much I miss him. He and the former chairman of our committee were my really two best friends here.

I miss you very much and I welcome you here again, Jack.

Senator JAVITS. Thank you, Claiborne.

The CHAIRMAN. Senator Dodd.

Senator DODD. I miss you, too, and I did not even get a chance to serve with you. But believe me, I miss you up here. It is a pleasure to hear someone as eloquent, as thoughtful, and as perceptive as you. You are one of the giants of our time. I think if we could fulfill any wish you might have, it would be to get this thing through.

Senator JAVITS. That certainly is true.

Senator DODD. If we can't do anything else, we ought to do that for Senator Javits.

Senator JAVITS. Thank you.

The CHAIRMAN. I want to say publicly also that I not only miss Senator Javits, but I have found him at any hour of the day or night at the end of the telephone. Whenever this committee needs him, he always is there. When I called him the other day and asked if he would make an appearance here today, he certainly acceded to that request immediately.

We are very grateful for your continuing counsel and wise judgment. I happen to believe that in this position, as in so many others, you are always right. Of course, that is not always accepted by every member of this committee.

Thank you very much, Senator Javits.

Senator JAVITS. Thank you, Mr. Chairman, and thank you, Senator Pell.

[General applause for Senator Javits.]

The CHAIRMAN. Our next panel of witnesses will consist of Prof. Richard N. Gardner, Columbia Law School, New York, N.Y., representing the Ad Hoc Committee on the Human Rights and Genocide Treaties; and Robert M. Bartell, chairman of the Board of Policy of Liberty Lobby, Washington, D.C.

Professor Gardner we are pleased to have you back before this committee and welcome your statement.

STATEMENT OF PROF. RICHARD N. GARDNER, COLUMBIA LAW SCHOOL, REPRESENTING THE AD HOC COMMITTEE ON THE HUMAN RIGHTS AND GENOCIDE TREATIES, NEW YORK, N.Y.

Ambassador GARDNER. Mr. Chairman, it is a rare and special privilege to be testifying after the most eloquent and powerful statement of Senator Javits, one of our greatest Americans.

It is also a very special privilege to be here representing the Ad Hoc Committee on the Genocide and Human Rights Treaties which, as you well know, represents now 55 national organizations, our major Catholic, Protestant, and Jewish religious groups, major veterans' groups, civic groups, women's groups, black organizations, and labor organizations. Together, they comprise millions of our fellow Americans.

I would like, with your permission, to have printed at the close of my testimony the list of these organizations so that it may be on the record who has stood up for the Genocide Convention.[1]

With your permission, Mr. Chairman, I would also like to have printed—and this will enable me to be shorter in my verbal statement—the article, "Time To Act on the Genocide Convention," which Arthur J. Goldberg and I wrote some years ago in the American Bar Association Journal, and which I believe deals with the various legal objections that have been presented to us today.

The CHAIRMAN. Those insertions will be incorporated in the record of this hearing, without objection.

You are referring to the February 1972. statement that you and Arthur Goldberg made, are you not?

Ambassador GARDNER. That is correct.[2]

Mr. Chairman, it seems to me that there are two—and really only two—major issues before this committee with respect to this Convention: First, is the national interest of the United States served by taking an international commitment against mass murder? Second, is there any valid legal objection to our doing so?

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[1] See p. 46.
[2] See p. 72.

With your permission, I want to address these two questions as briefly as I can.

On the national interest of our country, may I make this personal statement.

As you know, I recently have come back after 4 years as U.S. Ambassador to Italy. I have come back deeply troubled. My experience in Europe these last 4 years has confirmed my deep concern that our national security is threatened as never before. It is threatened by the growth of Soviet military power and the willingness, demonstrated in Afghanistan and elsewhere, of the Soviet Union to use that power outside its borders and outside its sphere of influence.

I favor and strongly support measures to defend our security through a greater and stronger military defense. But, Mr. Chairman, our national security cannot be assured by arms alone, as you have so many times stated so eloquently.

The Soviet Union seeks the political isolation of the United States and the political isolation of the United States would be just as great a threat to our national security as the SS–20 or any intercontinental ballistic missile possessed by the Soviet Union.

Our inability, our incapacity, our refusal to ratify this and other human rights treaties contributes to this political isolation of our country.

One way we can defend our national security in the nonmilitary field is by waging the diplomacy of ideas, because what is going on in Italy, in Europe and around the world is a struggle, an ideological struggle, between ourselves and the Soviet Union and those who believe in their philosophy.

In Italy, one of our closest allies, the Communist Party grew between World War II and 1976 from 18 percent to 34.4 percent in the vote. When I arrived, they were on the threshold of taking power in the government.

During my 4 years, I toured the length and breadth of Italy, a country on which you and Senator Pell are great experts, trying to convey to the people of Italy what the issue was in the world between freedom and totalitarianism.

I went into the universities and talked about what we believe in, in the West, that unites us and distinguishes us from the Soviet Union. I talked more than anything else about human rights. In many of my lectures, members of the Communist Party sat in the first row glumly and with increasing embarrassment. The reason they were embarrassed is obvious: There is no way that they can reconcile the philosophy of Marxism-Leninism with the philosophy of freedom, a philosophy which is embodied in these human rights instruments.

What I am trying to say is that I deeply believe, based on this experience in Italy and on my prior experience in the United Nations, that our failure to ratify this instrument is a diplomatic embarrassment which gets in the way of our pursuing that diplomacy of ideas which is essential to the defense of our national security in the 1980's.

Now I come to the second question: Is there any legal objection to our taking an international commitment against mass murder?

The British have done it. I don't believe they value their liberty any less than we do. The French have done it. The Italians have done it. All the great industrialized democracies have done it. Can it be that we, uniquely among the free nations of the world, are incapable to taking such a commitment?

We hear various arguments and some have been put before you today. It is said, for example, that this treaty embodies a novel theory of international law, that in effect it internationalizes matters that should be subject exclusively to domestic jurisdiction.

This charge is totally without foundation. Our country has entered for decades into international commitments, regulating the actions of American citizens within our own country.

We do this in our national interest where it serves our foreign policy objectives. We take commitments regulating actions of Americans with respect to narcotic drugs, killing of wildlife, protection of nature, conducting forced labor, or slavery. We have made these commitments in treaties which have been approved by the Senate. It cannot be seriously maintained in the year 1981 that this is beyond the Constitution of the United States.

I am particularly struck by the fact that some of the commitments we have taken have to do with the protection of birds and trees, and I know of nothing in the Constitution of the United States that says that birds and trees are more important than people.

The second argument that is made is that somehow entering into this treaty is going to destroy the constitutional rights of our people. There is no constitutional right to conduct mass murder. A treaty that outlaws mass murder does not take away any rights of the American people.

A lot of the possible horribles conjured up by the people objecting to this convention ignore the plain language of this treaty. This treaty is not about hurting somebody's feelings, as some people have suggested, or depriving somebody of welfare benefits, or an individual act of murder. This treaty is about certain specified acts committed, and I quote, "with intent to destroy in whole or in part a national, ethnic, racial, or religious group, as such."

It is only by ignoring that plain language that those objecting to this treaty can carry forward their parade of possible horribles. But if they are brought back to that sentence, it becomes clear that their objections are without foundation.

A third point that is continually raised is that this treaty is going to destroy the rights of the States, that it will destroy States rights and will federalize things that are now within the domain of the States.

That is clearly wrong. As has been pointed out by the American Bar Association and other experts, mass murder is not something that is within the exclusive domain of the States. The carrying out of mass murder is a Federal matter. It has been made a Federal matter by the Civil Rights Act. This point is developed at length in the article which Justice Goldberg and I wrote some years ago.

So, it would not change in any manner the balance of power between the Federal Government and the States.

Mr. Chairman, there is another argument which we have heard again this morning. I am sure it will be stated later on, too. The argument is that this convention somehow increases the risk that Americans will be prosecuted overseas for alleged acts of genocide on trumped up charges.

That is totally wrong. It is wrong because it does not add in any respect to this risk and, as Senator Dodd suggested, it may even diminish the risk.

There is nothing to prevent a hostile nation from getting hold of some American and trying him on a trumped-up charge now. The advantage of the Genocide Convention is that it defines "genocide" with precision. Of course, anybody can charge the United States or an individual with genocide. But this convention, in the language that I have quoted, makes it clear that you can't try anybody unless he is trying to destroy a group. Therefore, an American soldier on the battlefield, defending in a war, or somebody who commits some other act, cannot, under the terms of this convention, be said to have been carrying on genocide.

The precise legal definition provided here is a help to us in resisting unauthorized actions by foreign countries in this field.

Moreover, the extradition commitment in this treaty, article VII, has been the source of argument. Some have said doesn't this oblige us to extradite Americans to be tried abroad for acts of genocide? It should be emphasized that this extradition commitment of the parties to the Genocide convention is to grant extradition, and I quote, "in accordance with their laws and treaties in force." So the only commitment we have is to extradite someone in accordance with our laws and with extradition treaties in force. If we don't have an extradition treaty in force with somebody, then there is no commitment. And, even if there is an extradition treaty in force with another country, our only commitment is to comply with its terms and with our own laws.

Where it is a trumped-up genocide charge, our laws would not permit extradition. Moreover, there is discretion in the Secretary of State to refuse extradition where it would not serve the national interest. This is a matter of discretion.

As the hearings have made clear in the past, and the legal research, we also have concurrent jurisdiction, the United States, to try our citizens for genocide based on nationality for alleged acts of genocide committed overseas.

So, we would have jurisdiction to try them for acts overseas and to deny extradition on the ground that they were already subject to our jurisdiction for that offense.

There is no international criminal court and there will be none. You know it and I know it. The best guarantee that there will be no such court to which our country will be subject is the Senate of the United States, which must give its approval to the setting up of such international tribunal before it would have jurisdiction over us and our citizenry. I think we can have confidence that the Senate would not do such a thing.

Finally, and I will close with this, Mr. Chairman, it is said that the language in this treaty is vague and ambiguous. But words are not self-interpreting. When we look at a statute or a treaty, we interpret it not only in the light of the language, but in the light of the legislative history and the drafting history.

I commend to the critics of this convention who are worried about phrases such as "incitement to genocide," "in whole or in part," and "mental harm" that they read the clear legislative and drafting history which has been well put together in the book by Nehemiah Robinson, which demonstrates that their fears are groundless.

Mr. Chairman, I will conclude with this observation: It is well over 30 years since this treaty was sent to the Senate. It is 10 years since this committee has been actively considering it. This is my third personal appearance on behalf of the ad hoc committee to discuss this matter.

I sincerely pray that we will not be here 10 years from now litigating this same matter. I think the American people are entitled to a decision on this matter. It is time to stand up and be counted on the Genocide Convention. We owe this to our people and we owe it no less to the memory of 6 million Jews who died in the Holocaust and to other ethnic, racial, and religious groups who have suffered from genocide in our tragic history of the last century.

Thank you, Mr. Chairman.

[The information referred to follows:]

[From the American Bar Association Journal, February 1972]

TIME TO ACT ON THE GENOCIDE CONVENTION

(By Arthur J. Goldberg and Richard N. Gardner)

(The Senate Foreign Relations Committee has reported favorably on the Genocide Convention, which now awaits action by the Senate. A major stumbling block to ratification has been the continuing opposition of the American Bar Association, although the Sections and the Committees of the Association concerned with the subject matter have recommended favorable action on the convention. The legal objections raised against ratification are without foundation or substance and are unpersuasive.)

It is now more than twenty-five years since the United Nations first took up the question of the prevention and punishment of the crime of Genocide. On December 11, 1946, the General Assembly unanimously adopted Resolution 96(I), which affirmed "that genocide is a crime under international law" and requested the Economic and Social Council to draft a genocide convention. Two years later, on December 9, 1948, by Resolution 260A(III) the General Assembly unanimously approved the text of the Convention on the Prevention and Punishment of the Crime of Genocide.

Seventy-five countries now have ratified the Genocide Convention. The United States is the most prominent U.N. member that has not. One reason for our country's failure to ratify—very possibly the principal reason—has been the opposition of the American Bar Association recorded in a decision of the House of Delegates on September 8, 1949.

Since 1949, however, sentiment within the Association has changed. At the Midyear Meeting of the House of Delegates on February 23, 1970, a proposal to reverse the 1949 position and to place the American Bar Association on record in favor of the Genocide Convention failed by a vote of 126 to 130. Still more significant, every Section and Committee of the Association having specialized competence in the subject matter has come out in support of ratification of the Genocide Convention during the last few years: the Section of Individual Rights and Responsibilities, the Section of International and Comparative Law, the Section of Criminal Law, the Section of Judicial Administration, the Section of Family Law, and the Standing Committee on World Order Under Law.

Ratification of the Genocide Convention also has been endorsed by a number of past President of the Association, including Bernard G. Segal, William T. Gossett, Charles S. Rhyne and Witney North Seymour; by the Chairman of the Standing Committee on Federal Judiciary, Lawrence E. Walsh; by Solicitor General Erwin N. Griswold; and by many other leaders in the Association.

Two distinguished members of the Association, Eberhard P. Deutsch and Alfred J. Schweppe, however, appeared on behalf of the Association to testify in opposition to the Genocide Convention in hearings held before a Senate Foreign Relations Subcommittee on March 10, 1971, and presented the legal objections that have been raised against the convention.[1] Given the almost evenly divided vote in the House of Delegates and the support for the convention from relevant specialized Sections and Committees of the Association, we believe that it is appropriate to present the different viewpoints now existing in the Sections and Committees.

The authors of this article appeared at the Senate hearings on behalf of the Ad Hoc Committee on the Human Rights and Genocide Treaties (a committee of fifty-two national, civic, religious and labor organizations) and presented legal arguments in favor of the convention.[2]

The full Senate Foreign Relations Committee reported favorably on the convention by a vote of 10 to 4 and recommended that the Senate advise and consent to ratification. After carefully reviewing the arguments, the committee concluded:

> We find no substantial merit in the arguments against the convention. Indeed, there is a note of fear behind most arguments—as if genocide were rampant in the United States and this Nation could not afford to have its actions examined by international organs—as if our Supreme Court would lose its collective mind and make of the treaty something it is not—as if we as a people don't trust ourselves and our society.[3]

REPORT OF SENATE PROVIDES AUTHORITATIVE REFUTATION

We believe the report of the Senate Foreign Relations Committee provides an authoritative refutation of the legal arguments opponents of the Genocide Convention have employed to justify their opposition for nearly a quarter of a century.

We present here a point-by-point rebuttal of the legal arguments against the convention, drawing from our testimony to the Foreign Relations Committee as well as the committee's own report, in the hope that it may clarify the legal issues and contribute to speedy and favorable action by the Senate.

1. The contention that the Constitution prevents ratification of the Genocide Convention because genocide is a "domestic" matter is without foundation.

In his testimony to the Foreign Relations Committee, Mr. Deutsch declared himself fully in agreement with the decision of the United States to vote in favor of the General Assembly resolution on genocide of December 11, 1946: "Standing foremost as a world leader in the protection of individual rights, she could do no less." But he added that "having joined in such a declaration as to a matter *which lies, ultimately, within the domestic sphere of each of the world's nations*, the United States has gone far enough" (italics supplied). The italicized language is clearly incompatible with the statement in the General Assembly resolution that "genocide is a crime under international law". Mr. Deutsch's extensive quotations from Resolution 96(I) neglected to include this key provision.

Nowhere in his testimony did Mr. Deutsch explain his conclusion that genocide is a "domestic matter". His reasoning on this general issue may be found, however, in a report which he prepared in 1967 as chairman of the American Bar Association's standing Committee on Peace and Law Through United Nations. It is there stated that a convention deals with "domestic" matters when it deals "with the relation between a state and its own citizens".[4] But this is not the relevant constitutional test.

As the Supreme Court declared in *Geofroy* v. *Riggs* 133 U.S. 258, 267 (1890), the treaty-making power may be exercised on any matter "which is properly the subject of negotiation with a foreign country". The United States is a party to numerous international agreements relating to the activities of its own citizens within the United States because those treaties nevertheless deal with matters appropriate for international negotiation. Examples include treaties on narcotics,[5] public health[6] and nature conservation,[7] and the Supplementary Convention on Slavery, which Mr. Deutsch initially opposed on the ground that it also dealt with "matters essentially within the domestic jurisdiction of the United States".[8]

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[1] *Hearings on the Genocide Convention Before a Subcomm. of the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 12-54 cited hereafter as 1971 *Hearings*. The testimony of Mr. Deutsch was virtually identical to his article with Orie L. Phillips, *Pitfalls of the Genocide Convention*, 56 A.B.A.J. 641 (1970).

[2] 1971 *Hearings* at 107-137.

[3] Sen. Ex. Rep. No. 92–6, 92d Cong., 1st Sess. (1971), cited hereafter as Senate Report.

[4] *Human Rights Conventions, Hearings Before the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess., Part 2, 70 (1967).

In the words of the Special Committee of Lawyers of the President's Commission for the Observance of Human Rights Year, of which retired Supreme Court Justice Tom C. Clark was chairman: "Treaties which deal with the rights of individuals within their own countries as a matter of international concern may be a proper exercise of the treaty making power of the United States. . . . It may seem almost anachronstic that this question continues to be raised."[9]

What is "properly the subject of negotiation with a foreign country" and, therefore, a valid subject of a treaty is something the Senate has an obligation to determine in each case. We do not take the position that the executive branch can make any matter "international" by putting it in a treaty. But the question should be determined objectively in the light of the current interests of the United States in an interdependent world and contemporary concepts of international law—not on the basis of notions that may have been appropriate to a different historical era.

By any objective standard, genocide is a matter of international concern and is, therefore, an appropriate subject for the exercise of the treaty-making power. In our shrinking world the massive destruction of a racial, religious or national group in one country has its impact on members of this group in other countries, stimulates demands for intervention and inevitably troubles international relations. The fact that the United Nations General Assembly unanimously declared genocide to be a crime under international law in 1949 and that seventy-five members of the United Nations are parties to the Genocide Convention (including, to name just a few, such democracies as the United Kingdom, Canada, France, Mexico and the Scandinavian countries) is further evidence that genocide can no longer be considered a matter wholly within domestic jurisdiction. As was said by the Senate Foreign Relations Committee: "On both moral and practical grounds, the commission of genocide, involving as it must mass action, cannot help but be of concern to the community of nations."

2. The contention that the Genocide Convention would alter the balance of authority between the states and the Federal Government is unfounded.[10]

The Constitution by Article I, Section 8, specifically gives Congress the power to "define and punish . . . offenses against the law of Nations." Genocide is an offense against the law of nations and is thus within the power of Congress to outlaw. Moreover, the power of the Federal Government in this field has been confirmed in the Civil Rights Acts of 1957 and 1964 and the Voting Rights Act of 1965. The Association's Section on Individual Rights and Responsibilities said in its report: "Ratification of the convention will add no powers to those the Federal Government already possesses."

3. The contention that ratification of the Genocide Convention would subject American citizens to trial in foreign countries like North Vietnam on trumped-up charges of genocide is wholly false.[11]

There is nothing in the Genocide Convention that would provide warrant for charges by North Vietnam that our prisoners of war, being held under conditions in violation of the Geneva Convention, are guilty of genocide. This is a matter of great concern to the authors and, of course, many Americans regardless of their views about the war in Vietnam. As the Senate Foreign Relations Committee pointed out in its report, however, Hanoi can make trumped-up charges of genocide against our servicemen who fall into their hands with or without reference to the Genocide Convention. In the words of the committee: "It is reality that American prisoners of war in North Vietnam could now be charged by the Hanoi government for war crimes or genocidal acts on whatever trumped-up charges Hanoi wishes to make. Their peril will not be increased by approval of this convention while peril may be avoided for tens of millions by ratification of the convention."

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[5] 1912 Convention Relating to the Supression of the Abuse of Opium and Other Drugs (T. S. 612); 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs (T. S. 863); 1953 Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of the International and Wholesale Trade in and Use of Opium (T.I.A.S. 5273).

[6] World Health Organization Regulations No. 1 (T.I.A.S. 3482), as amended (T.I.A.S. 3482 and 4409), and World Health Organization Regulations No. 2 (T.I.A.S. 3625), as amended (T.I.A.S. 5156, 4420, 4823, 4896, 5459 and 5863).

[7] 1940 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (T. S. 981).

[8] *Human Rights Conventions and Recommendations*, Draft of Proposed Report for Consideration by Section and Committee, April, 1967.

[9] For another example of confusion as to the relevant constitutional test, see Raymond, *Don't Ratify the Human Rights Conventions*, 54 A.B.A.J. 141 (1968). Mr. Raymond, evidently unaware of the treaty cited in note 7, takes the view that the United States can make treaties on the protection of wildlife only when birds fly from one country to another.

[10] This contention appears in the appendix to Mr. Schweppe's statement to the Senate subcommittee, 1971 *Hearings* at 71, although it is not in Mr. Deutsch's testimony.

[11] This contention appears in the testimony of Mr. Deutsch, 1971 *Hearings* at 20, 37–39.

As to the possibility of extraditing Americans from the United States to North Vietnam or other countries for acts of genocide allegedly having occurred there, it should be remembered that under the Genocide Convention, extradition would take place only in accordance with laws and treaties in force. We have no extradition treaties with North Vietnam. Nor do we make such treaties with countries whose legal systems do not afford basic procedural safeguards. We do not grant extradition in any event unless a prima facie case is established against the accused and unless the accused will be afforded by the requesting state the due process provided by our own law.

Finally, the Genocide Convention, in accordance with an agreed interpretation of Article VI which is contained in the relevant U.N. committee report, "does not affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State".[12] The Foreign Relations Committee expressed itself as fully satisfied on this point but recommended an understanding to this effect to remove any possible uncertainty. The Nixon Administration has further indicated that any agreements we make covering genocide will assert the right of the United States to refuse to extradite an accused if he is standing trial in the United States or if our Government elects to try him itself.[13]

4. The argument that ratification of the Genocide Convention would subject the United States to irresponsible charges of genocide arising out of Vietnam, our treatment of American blacks or other situations is without foundation.[14]

Here again, ratification of the Genocide Convention does not alter the present situation to our disadvantage. Even in the absence of our ratification, there is nothing to prevent a country from making baseless charges of genocide against this country in the U.N. If anything, ratification would improve our position, because the convention requires an "intent to destroy, in whole or part, a national, ethnical, racial or religious group as such".

The tragic events in Vietnam and the terrible loss of life, both military and civilian, that has occurred there do not meet this definition, whatever other domestic legal consequences may flow from allegedly illegal acts there. The treatment of the black community in the United States, which admittedly has suffered widespread discrimination for many years, also does not fall within the definition. In both cases the necessary intent to destroy a racial or ethnic group as such is missing.

As the Senate report indicates, ratification of the convention would, if anything, help us rebut these charges by subjecting our behavior to a precise legal definition of genocide.

5. The argument that provision for the settlement of disputes by the International Court of Justice would override the Connally Amendment and unreasonably limit our sovereignity is without substance.[15]

The Connally Amendment applies only to our acceptance of Article 36(2) of the court's statute, the so-called optional clause providing for compulsory jurisdiction across the board. Cases arising as a result of our adherence to the Genocide Convention would fall under Article 36(1) of the court's statute, which covers the court's jurisdiction as provided for in specific treaties. The United States has ratified many treaties containing the same type of provision for the settlement of disputes by the International Court of Justice as is contained in the Genocide Convention. Among these treaties are the Supplementary Convention on Slavery, the Antarctic Treaty, the Statute of the International Atomic Energy, and the Convention on the Privileges and Immunities of the United Nations ratified in 1970.

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[12] See Robinson, The Genocide Convention—A Commentary 83–84 (World Jewish Congress, 1960), containing citations to the drafting history on this point.

[13] *Genocide Convention, Hearings Before a Subcomm. of the Senate Comm. on Foreign Relations*, 91st Cong., 2d Sess. 45–46 (1970), testimony of George Aldrich, Deputy Legal Adviser, Department of State.

[14] This argument is made by Mr. Deutsch, 1971 *Hearings* at 18, 31–33.

[15] This argument is made by Mr. Deutsch, 1971 *Hearings* at 22, 46.

This provision for the settlement of disputes over the interpretation of the Genocide Convention does not unreasonably limit our sovereignty. Our interests are better served by having any charges of genocide against us considered in a judicial forum like the International Court of Justice than in more politically motivated forums. Of course, by this provision we do undertake a commitment to subject ourselves to third-party judgment in a limited sphere, as do the other parties to the convention. This exchange of commitments may be found in many treaties to which we have become a party. Where the exchange of commitments serves our national interest, as it does here, it provides no valid basis for objecting to the treaty.

It should be noted that the Soviet Union and other countries have ratified the convention subject to a reservation that they do not accept compulsory reference to the International Court of Justice. As a result, the United States will be in a position to invoke these countries' reservations in its own behalf to defeat the court's jurisdiction if a case charging genocide should be brought against us by those countries.

6. The argument that various provisions in the convention—"in whole or in part", "mental harm", "direct and public incitement to commit Genocide"—are loosely drafted and potentially harmful to our interests is without foundation.

Words in a statute or treaty are not self-interpreting. They must be read in the context of other provisions and in the light of the legislative or drafting history. The hypothetical interpretations of the Genocide Convention advanced by the critics are invalidated by the language of the convention itself and by the records of the negotiation.

Thus, "in whole or in part" does not mean that the killing of a single individual, profoundly deplorable as any killing is, becomes genocides.[16] As the negotiating history makes clear, substantial numbers must be involved, and for the definition of genocide to be satisfied the acts of homicide must be joined by a common intent to destroy the group. The understanding recommended by the Foreign Relations Committee to confirm this point is wholly consistent with the drafting history.[17]

"Mental harm", in turn, would not support propaganda charges of harassment of minority groups, as charged by some critics,[18] because mental harm becomes an element of genocide only when done with an intent to destroy a group. Moreover, as the negotiating history shows, this provision was inserted for the narrow purpose of prohibiting the permanent impairment of mental facilities, as through the forcible application of narcotic drugs. Once again, the understanding recommended by the Foreign Relations Committee is wholly consistent with the drafting history.

"Direct and public incitement to commit genocide does not cover constitutionally protected speech.[19] It covers incitement which calls for the commission of mass murder, which is actionable under our Constitution as in other countries. As the Supreme Court declared in *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation *except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action*" (emphasis is added). In any case as was stated in *Reid* v. *Covert*, 354 U.S. 1 (1957), no treaty can override a provision of the Constitution, and there is no doubt that the legislation passed in implementing the Genocide Convention must be interpreted in accordance with the First Amendment.

7. The contention that ratification of the Genocide Convention would subject American citizens to trial before an international penal tribunal is without foundation.[20]

Article VI of the convention provides that persons charged with genocide shall be tried "by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction". This part of Article VI, perhaps regrettably, is a dead letter. No such international penal tribunal has been established, and there is no negotiation under way to create one. If such a tribunal were established, action by the Senate would be required, either in the form of advice and consent to ratification of a treaty or action on legislation, before the United States could accept its jurisdiction.

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[16] This claim was made by Mr. Schweppe, 1971 *Hearings* at 61.

[17] 1971 Senate Report at 1, 6, 18, Robinson, *supra* note 11 at 63.

[18] Mr. Deutsch, 1971 *Hearings* at 18–19, 33–34.

[19] As charged by Mr. Deutsch, 1971 *Hearings* at 45.

[20] This contention is made by Mr. Deutsch, 1971 *Hearings* at 21, 40–45.

Finally, it should be underlined that the International Court of Justice has no criminal or penal jurisdiction and considers only cases involving states, not individuals.[21]

8. The argument that the convention does not define genocide as having been committed "with the complicity of government" is no objection to ratification.[22]

The convention is directed at "persons" whether they are "constitutionally responsible rulers, public officials or private individuals." Each government is committed under the convention to punish such persons. There is no reason why such individuals should not be held responsible for genocidal act, even without government complicity.

9. The argument that the Genocide Convention abolishes the defense of "superior orders" is without foundation.[23]

The convention says nothing about a possible defense of "superior orders", but it is significant that the convention includes "intent" as an element of the crime of genocide. An authoritative review of the drafting history on this point summarizes the matter as follows:

"Ordinarily it would seem that no intent could be ascribed to persons merely fulfilling superior orders; intent implies initiative. However, superior orders would not be a justification in such cases where the guilty party was not only a tool of his superiors but participated in the "conspiracy to commit Genocide." Guilt could likewise be established in a case where, although acting under orders, the person was in a position to use his own initiative and thus act with the intent to destroy the group. The non-inclusion of a proviso relating to superior orders thus leaves the tribunals applying the Convention the freedom of interpreting it in accordance with the domestic legislation and the specific circumstances of the case."[24]

10. The argument that the omission of "political" groups makes the Genocide Convention worthless is unpersuasive.[25]

It is inconsistent for those who criticize the convention on the grounds that it subjects the United States to too much interference in its domestic affairs to complain at the same time that it fails to cover "political groups". In any event, the absence of one kind of group from the convention is no reason not to protect the groups that are covered.

RATIFICATION OF THE CONVENTION WOULD BE IN OUR BEST INTERESTS

We find the objections against ratification of the Genocide Convention to be without substance. The arguments in favor of ratification, on the other hand, seem to us compelling.

Our adherence to the Genocide Convention can make a practical contribution to the long and difficult process of building a structure of international law based on principles of human dignity. It will put us in a better position to protest acts of genocide in other parts of the world and will enhance our influence in United Nations efforts to draft satisfactory human rights principles.

We do not say that our adherence to this convention will work miracles. It may not bring very dramatic benefits in the short run. Let us remember, however, that none of the great documents of human civilization produced instant morality—not even Magna Carta or our own Bill of Rights. The point is that they did shape history in the long run. We believe the same may be true of the Genocide Convention, if we only give it a chance.

GENOCIDE CONVENTION OUTLAWS REPUGNANT ACTION

The Genocide Convention outlaws action that is repugnant to the American people and to our constitutional philosophy. We should not decline to affirm our support for principles of international law and morality in which we believe. Our country was founded on a passionate concern for human liberty reflected by the Bill of Rights and the Constitution. We believe that concern is very much alive today, as is reflected by the report of the Foreign Relations Committee supporting the convention. It is inconceivable that we should hesitate any longer in making an international commitment against mass murder. At a time when our commitment to human rights is being questioned by some of our own people and by others overseas, it is particularly important that we ratify a treaty so thoroughly consistent with our national purpose.

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[21] One of the exhibits submitted by Mr. Deutsch stated incorrectly that under the Genocide Convention the "U. N. World Court" would "hear cases of alleged incidents of physical or mental 'genocide' committed by individuals. . . . The accused in such cases would not be protected by the Bill of Rights." 1971 *Hearings* at 50.

[22] This argument is advanced by Mr. Deutsch, 1971 *Hearings* at 17–18, 30–31.

[23] This argument is made by Mr. Deutsch, 1971 *Hearings* at 39–40.

[24] Robinson, *supra* note 11 at 72–73.

[25] This argument is made by Mr. Deutsch, 1971 *Hearings* at 19, 35–36.

The CHAIRMAN. Thank you very much, Ambassador Gardner.

We have a vote on now, as I just heard the bells. I will try to continue the hearing until Senator Pell, who has left to vote, returns.

Mr. Bartell, why do you not proceed so that we can maximize the time we have together. Perhaps you would like to introduce your able colleague who is with you and then proceed with your statement.

STATEMENT OF ROBERT M. BARTELL, CHAIRMAN OF THE BOARD OF POLICY, LIBERTY LOBBY, ACCOMPANIED BY TRISHA KATSON, WASHINGTON, D.C.

Mr. BARTELL. Thank you very much, Senator Percy.

This is Trisha Katson, my colleague at Liberty Lobby and the Spotlight.

I feel sort of like the Lone Ranger. I think in all fairness, I should point out that although we have opposed the Genocide Treaty for many years, the mere fact that it has been in the Senate for 32 years and has not been acted on favorably is eloquent testimony to the fact that we are not alone in our opposition.

Mr. Chairman, I have submitted to you a written record of my testimony and I will just summarize it, if I may, in the interest of time.

It will come as no surprise to Senator Proxmire and to you, of course, Mr. Chairman, that Liberty Lobby opposes ratification. As I have said, we have been fighting the treaty for many years. We are not about to give up now.

Our opposition to the treaty goes beyond the mere desire for the Senate to reject it. We would like for the treaty to be sent back to the U.N. from whence it came, and we would like it understood that the United States wants no part of this destructive treaty that threatens to undermine our Constitution, now or ever.

Last October Liberty Lobby published a white paper on the Genocide Convention which outlines the dangers the treaty presents to our constitutional form of government. I would like to ask that it be included with the hearing, with your permission.

The CHAIRMAN. It will be incorporated. Thank you.

Mr. BARTELL. The questions that Liberty Lobby and others throughout the years have raised about the problems inherent in the treaty, problems we feel have not been solved by the understandings or implementing legislation, nor will be, are serious and legitimate. Many supporters of the convention, when they state their views on why they favor the treaty, spend most of their time refuting charges made by the opposition. These proponents argue that it is embarrassing that the United States has not yet ratified it, that it is morally right that we do so, and that it will help our foreign policy.

They also cite cases of genocide that have occurred in the past. Now, genocide of course is a tragedy that none of us wishes had ever happened. We all wish it would never occur. But past incidents, as tragic and senseless as they are, are they any reason to subvert the constitutional rights of U.S. citizens?

The answer to that question for most of us at Liberty Lobby and readers of the Spotlight is no, the United States does not need to sign the Genocide Convention to convince the world that it opposes genocide. Our history as a nation and a people is clear. The record speaks for itself.

We do not need to ratify a treaty that we feel will endanger our justice system to prove a point to the world, and we will not. That is a price we must never pay.

Although some 84 countries in the world have ratified the treaty, genocide of course continues.

The Spotlight interviewed the treaty's most vocal proponent, Senator Proxmire, on the treaty. And we feel, Mr. Chairman, that there is something terribly wrong with a treaty when its most staunch supporter says things like this about it:

> While the treaty is not a perfect document, its many advantages far outweigh any imperfections . . . there are possibilities of interpretation here that could raise problems for American citizens.

In response to the question of why the treaty has proved itself unable to prevent any acts of genocide that have occurred since 1946, Senator Proxmire said: "Yes, well, that is one difficulty."

Asked whether the treaty clarifies the difference between opposition forces and a national group to prevent U.S. servicemen from being prosecuted for war crimes, Senator Proxmire replied: "Well, you would be fighting a national group."

When asked to clarify whether he meant that the treaty does not differentiate between opposition forces and a national group, he said: "I said that if you are at war, the treaty would not apply." Mr. Chairman, the treaty clearly states in article 1 that: "Genocide, whether committed in time of peace or in time of war, is a crime under international law."

Many readers of the Spotlight and Liberty Lobby and their board of policy members demonstrate involvement in their government by writing their legislators and sending these letters, as well as the responses, to us at headquarters. These letters encompass a broad range of issues including, of course, the treaty convention.

We have received many letters, particularly in the last few months, probably spurred by our white paper, from Liberty Lobby supporters. These letters have been written by several U.S. Senators, many of whom strongly oppose the treaty, and some of them are included in my written testimony.

Former Secretary of State William P. Rogers told this committee that the United States has ratified many treaties that provide that disputes relating to interpretation, application, or fulfillment of a treaty shall be referred to the International Court of Justice, a provision found in article 9 of the genocide convention. This means that the Court could decide that the President had incorrectly interpreted the treaty and that the Supreme Court and the Federal courts' power to adjudge the legislation enacted by Congress to implement the treaty's provisions was inadequate.

As pointed out in our white paper, this article would repeal the Connally reservation, which is six key words inserted into the resolution accepting jurisdiction of the World Court in 1946. Because of it, the United States would not accept compulsory World Court jurisdiction in "matters which are essentially within the domestic jurisdiction of the United States, as determined by the United States."

Without the words, "as determined by the United States," the World Court can make its own determinations on what is to be deemed domestic and foreign matters, and the United States would be required to agree to any ruling made by the Court.

Article 94 of the U.N. Charter states that: "Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

Further, on the matter of extradition of U.S. citizens, the Special Committee on Peace and Law Through the U.N. of the American Bar Association has declared: "There should be no implied approval or commitment for the creation of an international court for trials of American citizens for genocide." But there is.

Genocide Convention supporters keep reminding us that in and of itself it is not an extradition treaty.

But if the Senate ratifies the Genocide Convention, we would be obliged to provide for the extradition of U.S. citizens in a new or amended treaty. That is what Herbert Hansell, legal adviser for the State Department, told this committee 4 years ago. Hansell said: "At the present time, genocide is not listed as an extraditable offense in any of our extradition treaties." For that to happen, he assures us, "We would have to negotiate a new or amend an existing extradition treaty."

"Would we be obliged to do that as a commitment?" Senator Case asked. Hansell replied, "Yes, as a commitment."

For quite some time, former Senator Sam Ervin, a noted and respected constitutional scholar, spoke out against the treaty and how its provisions violate many rights guaranteed by the Constitution. Time and again he warned that the Genocide Convention would, as a treaty, become a law of the land and override many rights that U.S. citizens now enjoy. Ervin no longer is carrying the torch against the treaty, but his burning questions are just as relevant now as they were then.

Genocide Convention supporters usually cite the 1957 Supreme Court case of *Reid v. Covert*, in which the Court ruled that treaties do not override the Constitution. However, at various times in history, different rulings have been made on this issue and nothing prevents the Supreme Court from making a new ruling in the future that would again make treaties supreme over the Constitution.

Even Senator Proxmire admits this possibility, although he considers it remote. There was enough doubt in the mind of former Senator John Bricker of Ohio to introduce an amendment to the Constitution to settle that issue once and for all. The amendment, which would have insured the Constitution's supremacy over treaties, was defeated by a single vote in 1954, but the controversy remains.

Incidentally, Representative John Ashbrook has introduced a similar measure in this Congress.

In *United States v. Pink* in 1942, a treaty was ruled to be the law of the land and executive agreements were given "similar dignity."

The Supreme Court ruled that "State law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement."

As pointed out by Senator Thurmond this morning, the *United States* v. *Pink* ruling has new meaning in the light of speculation that the United States could adopt the jurisdiction of an international penal tribunal by Executive order.

In *Missouri* v. *Holland* of 1920, the Court decided that the treaty involved was not limited by the 10th amendment, thus effectively overriding the Constitution. Justice Oliver Wendell Holmes pointed out the dangerous power of treaties: They are negotiated by the President and need only approval of the Senate, while State laws are required to be made pursuant to the Constitution.

To those aware of the danger, mere legal precedent of the type which has been reversed in the past and can be reversed at any time in the future is not sufficient protection for constitutional government.

Debate over the period of 32 years has demonstrated that the wording of the Genocide Convention is ambiguous, unclear, and subject to a wide variety of interpretation. In *Connally* v. *General Constitution Company*, 1935, the Supreme Court ruled:

> A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

If anything is clear about the Genocide Convention, it is that it does not meet the standard of the Court in this ruling. This is a loud signal that the treaty is a peril to U.S. constitutional freedoms and should be put to permanent rest.

The arguments on the vagueness of certain words and terms, such as "a substantial part," "mental harm"—and I will refer to Ambassador Gardner's comment that article 2 says "intent to destroy in whole or in part a national, ethnic, racial or religious group as such." He ignores section B, which says, "causing serious bodily or mental harm." We do not know what "mental harm" is.

To go on, "direct and public incitement," and the exclusion of others—"the complicity of government," for instance—these are legion. I cannot enumerate all of them. Suffice it to say that the ABA's under standings and implementing legislation have not made things any clearer, particularly in view of their reversal of their stand.

This is the best of all possible times to get rid of the Genocide Convention for good. Jeffrey Gaynor noted in a study on the treaty in the "Journal of Social and Political Studies":

> With general drift of opinion of international organizations away from constitutional law and the growing influence of the communist bloc nations, the genocide treaty will much more likely be used in the future for propaganda purposes against anti-communist countries than for serious efforts to curtail genuine genocidal actions in the world.

Nathaniel Webster once said the constitutional system of the U.S. "is the last hope of the world." We feel if the Senate ratifies this convention then that hope will fade.

Senator Jesse Helms of this committee said it quite well back in 1977:

> While the nation of a treaty to prevent genocide has emotional appeal in the abstract, the difficulty of translating such prohibitions into workable law without doing violence to our system of justice has proved to be insurmountable.

Bill Moudy is a Spotlight reader from Denham Springs, La. We thought he put it very well in a letter to Senator Russell Long. He said:

> I have read this proposed treaty very, very carefully and not only recognize its supposed lofty, humanitarian intent but am keenly aware of its danger to the sovereignty and the people of the United States. For other nations to have a say about the national affairs of the U.S. is a direct violation of the U.S. Constitution. We are not world citizens subject to world courts. We are U.S. citizens subject to the dictates and laws of our own sovereign nation. It is rank treason to abrogate the precepts and intents of the U.S. Constitution. It can be said no other way.

We therefore urge the rejection of the genocide convention. And I thank you for the opportunity to speak today.

[Mr. Bartell's prepared statement follows:]

PREPARED STATEMENT OF ROBERT M. BARTELL

Mr. Chairman and Members of the Committee, I am Robert M. Bartell, Chairman of the Board of Policy of Liberty Lobby. I appreciate this opportunity to appear today and present the views of our 30,000 member Board of Policy, as well as approximately a million readers of our weekly newspaper, The Spotlight.

Mr. Chairman, it will come as no surprise to Sen. Proxmire and a number of others present here today the Liberty Lobby opposes ratification of the Genocide Convention. We have been fighting this treaty for many years and we are not going to give up.

Liberty Lobby's opposition to the treaty goes beyond a mere desire for the Senate to reject it. We'd like for the treaty to be sent back to the UN, from whence it came, and we'd like it understood that the U.S. wants no part of this destructive treaty that threatens to undermine our Constitution—now or ever. As long as the treaty remains pending in the Senate Foreign Relations Committee, as it has for 32 years, it remains a peril to the liberties of Americans—and that is the important thing—far more important than its alleged therapeutic effect on our "image" overseas.

In October, Liberty Lobby published a White paper on the Genocide Convention, which outlines the dangers the treaty presents to our constitution form of government.

Mr. Chairman, the questions that Liberty Lobby and others throughout the years have raised about the problems inherent in the treaty, problems we feel have not been solved by the understandings or implementing legislation, are serious and legitimate. The spirit in which they are raised is genuine and sincere. At this point, I submit for the hearing record the contents of Liberty Lobby's White Paper on the Genocide Convention and request its insertion therein.

Supporters of the Genocide Convention, when they state their views on why they favor the treaty, spend most of their time refuting charges made by their opposition. These proponents argue that it is embarrassing that the U.S. has not yet ratified it, that it is morally right that we do so, and that it will help our foreign policy. They also cite cases of genocide that have occurred in the past. Genocide, of course, is a tragedy that Liberty Lobby wishes could never occur. But are past incidents, as tragic and senseless as they are, any reason to subvert the constitutional rights of U.S. citizens?

The answer to the question from most of the readers of The Spotlight and members of Liberty Lobby's Board of Policy is "no." The U.S. does not need to sign the Genocide Convention to convince the world that it opposes genocide. Our history as a nation and as a people is clear; the record speaks for itself. We do not need to ratify a treaty that will endanger our justice system to prove a point to the world. And we will not. That is a price we will never pay.

Although 84 countries in the world have ratified the treaty, genocide continues. The late Sen. James Allen of Alabama put it very well when he wrote John Sparkman, the former chairman of this committee:

It is almost too obvious to say—but in an era of rampant terrorism throughout the world, during a nation-building epoch that has caused rivers of blood to flow, and in an era when the world's population continually teeters on the brink of mass annihilation and is held back from that chasm only through the strength of this nation—that a treaty as ambiguous, morally ineffectual and legally suspect in terms of our law, could matter one whit in the course of man's relations with his neighbors.

The Spotlight interviewed the Genocide Convention's most vocal proponent, Sen. William Proxmire (D-Wis.) on the treaty. Mr. Chairman, there is something terribly wrong with a treaty when its most staunch supporter says things like this about it: "While the treaty is not a perfect document, its many advantages far outweigh any imperfections . . . there are possibilities of interpretation here that could raise problems for American citizens . . ." In response to the question of why the treaty has proved itself unable to prevent any acts of genocide that have occurred since 1946. Sen. Proxmire said, "Yes, well, that is one difficulty." Asked whether the treaty clarifies the difference between opposition forces and a national group to prevent U.S. servicemen from being prosecuted for war crimes, Proxmire replied, "Well, you would be fighting a national group." When asked to clarify whether he meant that the treaty doesn't differentiate between opposition forces and a national group, he said, "I said that if you are at war, the treaty would not apply." Mr. Chairman, the treaty clearly states in Art. I that "genocide, whether committed in time of peace or in time of war, is a crime under international law."

Many readers of The Spotlight and Liberty Lobby Board of Policy members demonstrate involvement in their government by writing their legislators and sending these letters as well as responses to Liberty Lobby. These letters encompass a broad range of issues, including, of course, the Genocide Convention. We have received many letters, particularly in the last few months—probably spurred by our White Paper—from Liberty Lobby supporters. These letters have been written by U.S. Senators.

Senator Proxmire told the Washington Post that the only opposition to the Genocide Convention is coming from "Liberty Lobby, the John Birch Society and other far-out groups of that sort." Perhaps Senator Proxmire is unaware of the opposition expressed by his own colleagues. To cite just a few of them:

Sen. Lloyd Bentsen (D-Tex.) says:

I have great concern for the advancement of human rights and the curtailment of genocidal acts. However, I oppose ratification of the Genocide Treaty as presently written. I do not want U.S. citizens subjected to extradition to other nations that may never have known our constitutional guarantees. I certainly would not support any treaty that would sacrifice our national sovereignty.

Sen. Sam Hayakawa (R-Calif.) tells his constituents that he continues to have strong reservations about the Genocide Convention:

There seems to be several international interpretations of the treaty. As a result, countries can pick and choose which provisions of the treaty to adopt. Eighty-four countries, including all communist countries, have actually adopted the convention with such severe restrictions as to make it meaningless. Moreover, given the growth irresponsibility of many nations, I believe we will only see the treaty used for the purpose of propaganda.

Sen. Barry Goldwater (R-Ariz.) says:

I cannot agree with the one-sided argument under which, as I interpret it, U.S. citizens will be subject to all kinds of charges and possible trials; but the monstrous crimes against humanity in communist nations will be free of punishment because they are labeled "political" activities outside the scope of the convention . . . (It's) too vague in its use of terms, such as "mental harm," "measures intended to prevent birth," and measures affecting "in part" a group. Under this language, a government act that injures a single individual could be called "genocide" against an entire group. I cannot support the convention the way it stands.

Sen. Dennis DeConcini (D-Ariz.) says:

The language of the treaty is extremely vague and encompasses more in its definition than what we commonly believe genocide to mean. It is conceivable that under the terms of the treaty, Idi Amin could arrest a U.S. citizen and charge him with complicity in genocide because the Chase Manhattan Bank has offices in South Africa. It is also possible that an American could be arrested abroad and charged with genocide because of the past treatment of blacks in this country.

These are just a few of the letters Liberty Lobby has received from concerned citizens, expressing the views of the U.S. senators they elected to office.

These citizens, and others like them, elected their representatives to office to serve their interests, and specifically to do one thing: to uphold and abide by the U.S. Constitution. Is this being done? Do all members of Congress uphold the Constitution as they are sworn to do?

Many Americans don't think so. And they feel that the Genocide Convention is another example of this intolerable behavior. Another individual who doesn't think that members of Congress uphold the Constitution is Ron Paul, representative from Texas. He wrote one constituent that although members of Congress and the president are sworn to uphold the Constitution, virtually none of them do so, that this oath is broken almost every day.

Beyond this, many Americans believe that the Senate has unwisely ratified treaties—the Panama Canal giveaway being the most recent example—or will soon misguidedly ratify treaties—such as the Law of the Sea Treaty and the Genocide Convention—that are a part of the layering over of internationalism by possible dual loyalties. These are treaties that ostensibly improve our foreign relations with other nations, but which in reality contain provisions that damage rather than help the U.S.

And there is plenty of evidence to support this allegation. Genocide Convention supporters have used the admission that the Senate already has ratified treaties that will do some of the damaging things that some fear would occur with ratification of the Genocide Convention. This argument has been used on the matter of extradition of Americans to be tried by a foreign court. "U.S. citizens in the physical territory of a foreign nation can be charged and tried for any offense, from shoplifting, to murder, even genocide," Sen. Mark Hatfield (R-Oreg.) says. "The treaty would not aggravate this existing situation, increase the punishment, or further jeopardize U.S. citizens abroad." Ratification of the Convention will not "further jeopardize U.S. citizens abroad." So, he seems to be saying, it is ineffective, so why not ratify it? This is indeed a sad commentary on the actions of the U.S. Senate and a poor excuse to ratify a treaty.

But that's not the only negative consequence of the Genocide Convention that proponents argue exist in treaties that have already been ratified. As to the charge that the Genocide Convention would enable the UN to probe actions concerning the acts of public officials and individuals in the U.S. as an alleged violation of the treaty, an administration spokesman replied in hearing testimony that yes, this could happen, but it already can be done.

Former Secretary of State William P. Rogers told this committee that the U.S. has ratified many treaties that provide that disputes relating to interpretation, application or fulfillment of a treaty shall be referred to the International Court of Justice—a provision found in Art. IX of the Genocide Convention. This means that the court could decide that the president had incorrectly interpreted the treaty, that Congress, the Supreme Court and the federal courts' power to adjudge the legislation enacted by Congress to implement the treaty's provisions was inadequate.

As pointed out in our White Paper, this article would repeal the Connally Reservation, which is six key words inserted into the resolution accepting jurisdiction of the World Court in 1946. Because of it, the U.S. will not accept compulsory World Court jurisdiction in "matters which are essentially within the domestic jurisdiction of the United States as determined by the United States." Without the words "as determined by the United States," the World Court can make its own determinations on what is to be deemed domestic and foreign matters. And the U.S. would have to agree to any ruling made by the court. Art. 94 of the UN charter states that "Each member of the United Nations undertakes to comply with a decision of the International Court of Justice in any case to which it is a party."

Further, on the matter of extradition of U.S. citizens, the Special Committee on Peace and Law Through the UN of the American Bar Association declared, "There should be no implied approval or commitment for the creation of an international court for trials of American citizens for genocide."

But there is.

Genocide Convention supporters keep reminding us that in and of itself it is not an extradition treaty. But if the Senate ratifies the Genocide Convention, we would be obliged to provide for the extradition of U.S. citizens in a new or amended treaty. That is what Herbert Hansell, legal adviser for the State Department, told this committee four years ago. Hansell said, "At the present time genocide is not listed as an extraditable offense in any of our extradition treaties." For that to happen, he assures us, "We would have to negotiate a new or amend an existing extradition treaty."

"Would we be obliged to do that as a commitment?" former Senator Case asked. Hansell replied, "Yes, as a commitment."

For quite some time, former Sen. Sam Ervin, a noted and respected constitutional scholar, spoke out against the treaty and how its provisions violate many rights guaranteed by the Constitution. Time and time again he warned that the Genocide Convention would as a treaty become the law of the land and override many rights that U.S. citizens now enjoy. Ervin is no longer carrying the torch against the treaty, but his burning questions are just as relevant now as they were then.

A report submitted to this committee in support of the treaty-making powers of the U.S. in human rights matters, prepared by the Special Committee of Lawyers of the President's Commission for Observance of Human Rights Year 1968 (October, 1969) stated:

For the U.S., problems of implementing human rights treaties have two dimensions: the nature of the implementation procedure provided for in treaties themselves, and the built-in implementation procedure peculiar to the U.S. arising out of the fact that its treaties are the supreme law of the land.

Genocide Convention supporters usually cite the 1957 Supreme Court case of Reid vs. Covert in which the court ruled that treaties did not overrule the Constitution. However, at various times in history, different rulings have been made on this issue—and nothing prevents the Supreme Court from making a new ruling in the future that would again make treaties supreme over the Constitution. Even Senator Proxmire admits this possibility, although considering it remote.

There was enough doubt in the mind of former Sen. John Bricker (Ohio) to introduce an amendment to the Constitution to settle this issue once and for all. The amendment, which would have ensured the Constitution's supremacy over treaties, was defeated by a single vote in 1954, and the controversy remains. (Rep. John Ashbrook has introduced a similar measure in this Congress.) In U.S. vs. Pink (1942) a treaty was ruled to be the law of the land and executive agreements were given "similar dignity." The Supreme Court ruled that "state law must yield when it is inconsistent with, or impairs, the policy or provisions of a treaty or of an international compact or agreement." This U.S. vs. Pink ruling has new meaning in the light of speculation that the U.S. could adopt the jurisdiction of an international penal tribunal by executive order.

In Missouri vs. Holland (1920) the court decided that the treaty involved was not limited by the 10th Amendment, thus effectively overriding the Constitution. Justice Oliver Wendall Holmes pointed out the dangerous power of treaties: they are negotiated by the president and need only approval of the Senate while state laws are required to be made pursuant to the Constitution. To those aware of the potential danger, mere legal precedent of the type which has been reversed in the past and can be reversed at any time in the future is not sufficient protection for constitutional government.

Another consequence of the Genocide Convention that concerned Senator Ervin was the possibility that U.S. servicemen would be subject to trial for killing and/or wounding members of the military forces of our enemies during war.

In 1969, Ben Miller of the American Bar Association (then opponents of the treaty) was afraid that U.S. servicemen could be charged with genocide by the North Vietnamese for fighting during the Vietnam war. "Would not the military strength of this nation and hence the nation itself be endangered if the Genocide Treaty were ratified?" This question is just as valid today as it was then. And although the ABA now supports the treaty, no words (original or added) change the concerns ABA voiced 12 years ago.

Many questions on this subject are unanswered. On the basis of Art. II, Sec. (a) of the Convention, the U.S. was widely accused of genocide against the Vietnamese people during the Vietnam war. If the U.S. were to ratify the treaty, wouldn't that make it easier for the enemies of our country to make others believe such accusations? If a similar situation occurs in the future and the U.S. has ratified the treaty, won't any accused servicemen then be subject to conviction?

Debate over the period of 32 years has demonstrated that the wording of the Genocide Convention is ambiguous, unclear and subject to a wide variety of interpretation. In Connally v. General Constitution Co. (1925) the Supreme Court ruled:

A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of the due process of law.

If anything is clear about the Genocide Convention, it is that it does not meet the standard of the court in this ruling. This is a loud signal that the treaty is a peril to U.S. constitutional freedoms and should be put to permanent rest.

The Genocide Convention gives quite a bit of power to the UN. Art VIII provides that "any contracting party may call upon the competent organs of the United Nations to take such action under the Charter of the UN as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Art. III." This provision was written long ago. Since then the prestige and credibility of the UN has decreased in the eyes of the American public, including many Spotlight readers and Liberty Lobby Board of Policy members. These individuals feel the UN's "organs" are not so "competent."

The Constitution protects against double jeopardy—being charged twice for the same crime—but if the Genocide Convention is ratified this would no longer be true. Art. VI states that "Persons charged with genocide or any of the other acts enumerated in Art. III shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction."

The ABA later added an understanding to this that "nothing in Art. VI shall affect that right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside the state." But this understanding would do nothing to prevent other countries from having concurrent jurisdiction over the trial of such individuals. Thus, one could be tried for murder in a state and also be charged for genocide before an international tribunal.

As for this international tribunal, which as stated previously, the Genocide Convention would not initially create but under which we would be obligated to create, it would only have to be approved by the Senate with no help from the House of Representatives, the body of Congress traditionally supposed to represent more closely the people of the U.S. And many people in the world would favor an international court where U.S. citizens could be tried. A president of the Foundation for the Establishment of an International Criminal Court made no bones about his feelings: "The aim is to begin small and to enlarge the scope as time progresses."

The arguments on the vagueness of certain words and terms, such as "a substantial part," "mental harm," "direct and public incitement"—and the exclusion of others: "the complicity of government, for instance—are legion and won't be enumerated here. Suffice it to say that the ABA's understandings and implementing legislation have not made things any clearer.

This is the best of all possible times to get rid of the Genocide Convention for good. Jeffrey B. Gayner noted in a study on the treaty in the *Journal of Social and Political Studies:*

". . . With the general drift of opinion of international organizations away from constitutional law and the growing influence of the communist bloc nations, the Genocide Treaty will much more likely be used in the future for propaganda purposes against anticommunist countries than for serious efforts to curtail genuine genocidal actions in the world."

As Daniel Webster once said, the constitutional system of the U.S. "is the last hope of the world." If the Senate ratifies this convention, that hope will fade away.

Sen. Jesse Helms, of this committee, said it quite well in 1977:

While the notion of a treaty to prevent genocide has emotional appeal in the abstract, the difficulty of translating such prohibitions into workable law without doing violence to our system of justice has proved to be insurmountable.

Bill Moudy, a Spotlight reader of Denham Springs, La., also put it very well in a letter to Sen. Russell Long (D-La.):

I have read this proposed treaty very, very carefully and not only recognize its supposed lofty, humanitarian intent but am keenly aware of its danger to the sovereignty and the people of the U.S. For other nations to have a say about the national affairs of the U.S. is a direct violation of the U.S. Constitution. We are not "world citizens" subject to world courts. We are U.S. citizens subject to the dictates and laws of our own sovereign nation. It is rank treason to abrogate the precepts and intents of the U.S. Constitution. It can be said no other way.

We therefore urge the rejection of the Genocide Convention.

Thank you again for this opportunity to appear today and present our views.

[From Spotlight, Sept. 21, 1981]

ULTRALIBERALS AGAIN PUSHING GENOCIDE TREATY IN CONGRESS

Sen. Charles Percy (R-Ill.) has pledged to "push ahead" with consideration of the Genocide Convention (treaty)—a pact so controversial that opposition to it has kept it pending before the Senate longer than any other treaty in history.

President Harry Truman in 1949 originally referred the treaty to the Senate, and it was taken to the Senate Foreign Relations Committee. If, after consideration by the committee, it is approved, it will go to the Senate floor for debate. Then it could pass with approval of two-thirds of Senators present. It would then "return" to the current president for his signature.

Since, over the years, four sets of hearings have already been held on the treaty, committee approval and Senate ratification could occur with little fanfare or delay.

The process for the treaty's ratification may have thus far taken a long time—32 years—but all signs point to quick action. Percy, chairman of the Senate Foreign Relations Committee, which has jurisdiction over the treaty, said he is committed to ratification of the treaty and is convinced the Senate will deal with it this year.

What has prevented the committee from forging ahead with ratification, according to Percy, is that it has been busy with other matters—"the almost steady hearings just putting together an organization, the State Department authorization, the defense and economic assistance program bill."

DANGERS

Concerned nationalists have alerted unsuspecting Americans about the nature of the treaty and about the possibility of its leading to a surrender of Constitutional rights for 32 years. William Korey, director of the International Policy Research for B'nai B'rith, has dismissed such critics as "extremists." He is convinced that "no serious difficulties" will prevent the treaty's ratification. B'nai B'rith is an illegal unregistered agent of a foreign power, Israel, which strongly supports U.S. ratification of the treaty.

Those opposed to the treaty feel that many dangers loom if it is ratified. For example:

Punishable acts would include "causing mental harm" to members of "a national, ethnic, racial or religious group." This language is too broad and vague.

Those who could be punished are not only public officials but private individuals, who would certainly suffer trying to defend themselves against such charges.

Those convicted will be given "effective penalties"—whatever that means.

U.S. citizens could be hauled off by UN troops and tried by an international body for acts alleged to have been committed within the U.S.

Wartime combat might result in charges of "genocide."

The U.S. could be forced to go to war to stop one nation from killing the nationals of another.

The World Court could allow the UN to probe the actions of private individuals in the U.S.

You have been made aware of the treaty's dangers in past articles (Spotlight, Feb. 16 and previously).

DEFINED

Under the treaty, "genocide" is defined as to destroy in whole or in part or to intend to destroy a national, ethnic, racial or religious group by killing, causing mental or bodily harm, inflicting harmful conditions and forcibly transferring children of the group to another group.

Conceivably, if you were caught telling, say, Polish jokes, this might be construed as genocide—causing mental harm to that ethnic group. And if found guilty by a foreign tribunal, you could be shot or hanged.

Perhaps the greatest criticism of the Genocide Convention is that it does not apply to political murder. Thus, the mass murder of civilians by the Communists is not "genocide."

CRITICS AND PUSHERS

For years, the treaty's loudest critic was former Sen. Sam Ervin, a noted and well-respected Constitutional scholar. He warned many times that certain provisions of the Constitution would automatically make the Genocide Convention, if passed, the supreme law of the land. After Ervin retired, the late Sen. James Allen (D-Ala.) carried the torch. Currently the treaty's most avid opponent is Sen. Jesse Helms (R-N.C.).

The treaty's most tireless supporter has been Sen. William Proxmire (D-Wis.). Another treaty proponent, Sen. Claiborne Pell (D-R.I.), says he has been "continually impressed" with the way Proxmire was "kept all of our feet to the fire on this issue over the years."

And that Proxmire has done. Every day that he has been on the Senate floor since 1967, confirms legislative assistant Larry Patton, Proxmire has brought up the Genocide Treaty. Criticisms of the treaty can be dismissed, Proxmire claims, because of "understandings" that the committee made to clear up the treaty's wording, which has often been attacked as being ambiguous.

[Emergency Liberty Letter, No. 40, Sept. 10, 1981]

GENOCIDE TREATY BEFORE SENATE

If ratified, the misnamed Genocide Treaty would override the Constitution by depriving American citizens of the right of trial by an American jury, freedom of speech and of the press. For example, if you were accused of causing "mental harm" to someone you could be arrested by United Nations police, hauled in chains to a foreign country and forced to stand trial before an international tribunal. If guilty, you "shall be punished" in any way seen fit. However, if you are a Communist you could liquidate a million political enemies because political crimes are not covered! The internationalists think they can push this Communist hoax through the Senate (a House vote is not needed) later this session during the flood of last-minute legislation that always backs up in Congress late in the year. This is an emergency . . . emergency . . . emergency . . .

The infamous Genocide Treaty could be brought up for a vote on the floor of the Senate at any moment. That moment is at hand. Sen. Charles Percy, chairman of the Senate Foreign Relations Committee, has promised the treaty will come up this year!

If you're familiar with the Genocide Convention, you know what this means. If not, prepare yourself for a shock!

The Genocide Treaty or Convention is a brainchild of the internationalists. It would literally supersede the U.S. Constitution by making American citizens subject to alien courts. According to Sen. William Proxmire (D-Wis.), the treaty's most ardent advocate, "The Genocide Treaty would outlaw the planned, premeditated eradication of an entire racial group or religious group or ethnic group."

Honorable and high-sounding words which no reasonable human being could oppose. But what the internationalists don't tell you is that if the Genocide Treaty is ratified by the Senate, it would signally impair the sovereignty of the U.S. and certain rights guaranteed by the Bill of Rights!

In fact, the language of the Convention is such that American citizens could be forcibly sent overseas to be tried by an international court if they were charged with a "genocidal" crime!

Former U.S. Sen. Sam Ervin (D-N.C.), a renowned Constitutional scholar, has this to say about the treaty: "If the Senate ratifies the Genocide Treaty, it would automatically make the convention the law of the land."

Shocking? Yes! But wait, it gets worse. For hundreds of years it has been a part of international law that uniformed soldiers, in action against national enemies, cannot be treated as common criminals (except in contravention of certain rules called the "law of war"). However, language in the Genocide Convention would permit trial and punishment of otherwise innocent soldiers.

If we ratify the Genocide Convention we would be duty-bound to intervene militarily in the Middle East to punish Arabs and Jews for killing each other. The same goes for the tribal wars in Africa, the killings in El Salvador, Angola, South Africa or anywhere else in the world people are being killed.

Signing this treaty would mean that American citizens could lose some unique American Constitutional guarantees, such as the right not to be charged for a capital crime except after a grand jury indictment; the right to a speedy and public trial by an impartial jury in the state and district wherein the crime is alleged to have been committed; the privilege against self-incrimination, the protection against unreasonable searches and seizures, the writ of habeas corpus and the right not to be denied life or liberty without due process of law.

Ever since 1948 when this infamous treaty was approved by the United Nations, advocates have tried to foist it off on the American people. Till now Liberty Lobby has succeeded in alerting enough Americans to stem the tide of internationalism and defeat the treaty.

But supporters of this treaty are smart, crafty and cunning. They know that at the end of every session of Congress there is a flood of legislation. Often Congress passes more measures in a week than in all the months before. This is a perfect situation for promoters of the Genocide Convention. Remember that two-thirds of the senators present can ratify a treaty—even if there are only a handful voting! In the rush and confusion of last-minute voting, the Genocide Convention could be quietly slipped by!

We must see to it that every Senator is told the dangers of the Genocide Treaty and alerted to the fact that it will be brought up on the floor at any time.

As in the past, we intend to purchase newspaper ads in carefully selected cities. We will alert millions of people through our daily radio program, and we will splash it all over The Spotlight. But that's not enough. We must also urge as many Americans as possible to contact their two senators immediately and demand that they fight against the treaty. We must have our people get on radio talk shows and explain the dangers of the treaty. We must use TV any way we can to spread the word of the upcoming vote.

WE MUST NOT LET IT PASS

Remember, the Genocide Treaty doesn't have to go to the House of Representatives for a vote. Only the Senate must act. Treaties become the law of the land and, incredibly, they are superior to ordinary laws, for Congressional law are invalid if they do not conform to the Constitution, whereas treaty laws can override the Constitution!

It is absolutely essential that you act immediately. Sit down and write your two Senators today. Contact as many of your friends, relatives, and neighbors as you can. Alert radio talk shows and send letters to the editor of your local paper. And send us whatever you can as a contribution for us to spread the word widely and rapidly.

In 1788 Patrick Henry said, "Sure am I if treaties are made, infringing our liberties, it will be too late to say our constitutional rights are violated."

Let us not be too late! Respond today.

Since 1948 patriots have been able to stop ratification of this horrible treaty. A treaty perfectly and cunningly designed to override the Bill of Rights and subject American citizens to the whims of international politicians. We can stop it again! Please respond immediately to this Emergency Letter. Remember,

Your Influence Counts . . . use it!

LIBERTY LOBBY WHITE PAPER ON THE GENOCIDE CONVENTION

FOREWORD

The controversy which has swirled around the ratification of the Genocide Convention (a treaty) since 1949 in its essence is a debate between those who oppose it because they believe it is inferior to our Constitution—in particular, our Bill of Rights—and that it would override the Constitution's most precious provisions, and those who on the contrary feel that the Genocide Convention is superior to our Constitution.

This is true although there are a large number of persons who for one reason or another choose to believe that although the Genocide Convention is inferior to The Constitution it is not a threat to it and to the liberties which we as Americans are accustomed to enjoy and which are the envy of most of the rest of the world.

Liberty Lobby is decidedly of the conviction that The Constitution of the United States of America is the greatest document ever struck by the brain and purpose of man and that it needs no embellishment; in fact that amendments to it only weaken and water down its unique spirit and meaning, and we further believe that the Genocide Convention, if ratified even with the understandings and the implementing legislation which have been proposed by the American Bar Association will constitute by far the greatest single blow against the integrity of that document and our national sovereignty since ratification of The Constitution in 1788.

The purpose of this paper is therefore to:

(1) Show that the rights guaranteed by The Constitution are superior to the provisions of the Genocide Convention;

(2) Examine the failings of and the fallacious arguments for the Genocide Convention;

(3) Prove that the Genocide Convention, in spite of its proposed reservations and implementing legislation, would override the Constitution and the Bill of Rights;

(4) Determine the true purpose of the Genocide Convention.

I

THE RIGHTS GUARANTEED BY THE CONSTITUTION ARE SUPERIOR TO THE PROVISIONS OF THE GENOCIDE CONVENTION

No proof of this is needed other than to contrast the two. In Appendix I of this white paper is reprinted the first ten amendments to The Constitution—the Bill of Rights—followed by the text of the Genocide Convention (GC), including the "understandings" and implementing legislation. Should the GC be ratified by the Senate and signed by the president, it would repeal many of the protections given to American citizens by the First, Fourth, Fifth, Sixth, Seventh and Eighth amendments, as will be explained.

II

THE FAILINGS AND WEAKNESSES OF THE GENOCIDE CONVENTION AND THE FALLACIOUS ARGUMENTS GIVEN FOR IT

(What the GC would not do)

What are we talking about?

It has been wisely said that most of the world's troubles are caused by misunderstandings between people over the meaning of words, and if this is so, the GC holds forth the greatest potential imaginable for evil.

Because the truth is that the word, "genocide," is at best an abstraction that has no accepted meaning and therefore may be interpreted by any journalist or politician for his or her own purposes.

"Genocide" has three levels of meaning. The public understands the term if at all as meaning "mass murder," which would seem to be proper. Naturally, everyone is against mass murder and everyone would like to see the numerous holocausts of the past occur no more.

Dictionaries, however, give slightly different meanings. Merriam-Webster's Seventh New Collegiate Dictionary defines genocide as "The deliberate and systematic destruction of a racial, political or cultural group." The Living Webster Encyclopedic Dictionary defines it as, "Deliberate mass murder of a race, people or minority group." Webster's New World Dictionary says it is "The systematic killing of a whole people or nation."

Political mass murder accepted

Surprisingly, the definition of the term genocide in the GC is substantially different than both the popular understanding and dictionary definitions. In addition to certain sorts of killing, the GC sets forth such things as "mental harm," moving children from one place to another and even birth control. All these and less are "genocide," for although the popular understanding, as well as many dictionary definitions, include a political aspect of the crime, amazingly the GC is very careful to eliminate political murder as genocide.

Thus, under the Genocide Convention, President Reagan could be accused of Genocide because he has put immigrant Cubans in detention camps but Stalin could not have been convicted of genocide for the slaughter of more than twenty million anti-communist dissenters. The one is defined as "genocide" in the GC; the other—a political crime—is exempt.

The late Bishop Robert J. Dwyer, writing in the Nevada Register (Feb. 18, 1955), said:

"What does genocide mean? Surely our experience of it tells us that it is the political liquidation, enslavement, or brutalization of any particular race or racial group, on the basis of its alleged inferiority. But the Convention, most amazingly, neglects to list political genocide in its catalog of contents. It is as though one were to draw up a charter of religious liberty and fail to mention the freedom to worship God. Other types of genocide (if they are really such) social, racial, colonial, are listed prominently for reprobation, but the one phase of it which has shocked the universal conscience, as practiced by Nazi or Communist, is significantly omitted. In other words, a political decision to liquidate a subject race might not be genocide according to the meaning of the Convention, but an isolated act of racial prejudice would be. Here, if anywhere in our experience, is a classic example of straining at a gnat and swallowing a camel.

"It raises a very serious question. Did the framers of the Convention genuinely intend to eliminate genocide, or was their intention, rather, to provide a whitewash for what they knew was an inevitable consequence of the dialectic materialism of Marxism? This may be unjust, for we can only read the document, not the minds of those who drew it up. But if they left the barn door wide open, one cannot help wondering why. It is hardly conceivable that they could have been unaware of the omission. . . ."

Supporters of the GC do not permit their understanding of this incredible deficiency of the GC to discourage them. Here is what the very liberal, very internationalistic former Rep. Seymour Halpern (R-N.Y.) said in 1966:[1]

"Admittedly, the convention falls short of the ideal. In omitting political and economic groups from the definition of genocide, we are failing to include the most tyrannical and willful persecution imaginable. Theoretically, the Soviet Union under this prescription cannot be accused of genocide if it massacres all peasants with bourgeois inclinations, because the purpose is political and economic."

Thus, the GC would not have any effect on the one power in the world which traditionally practices mass murder, the Soviet Union. This fact alone should be enough for any American to reject it out of hand.[2]

No wonder the Kremlin has ratified the GC—it does not affect the freedom of action of the rulers of Russia in the slightest. One convention they refuse to sign, however, is the Forced Labor Convention which prohibits imposition of slavery for political activity opposed to government.[3] Bleeding hearts who are so eager for the U.S. to ratify the GC could better use their efforts to influence the communists to ratify the Forced Labor Convention.

Why then the fuss?

The argument for American ratification of the GC boils down to one thing: it is allegedly "embarrassing" to America and "hurts our foreign policy" not to accept it. Yet, why should we be "embarrassed" for not ratifying a treaty to stop us from doing something we are not doing whereas it is not "embarrassing" for the USSR to refuse to ratify a treaty to outlaw a crime it commits every day?

The arguments for the GC are seldom addressed to the specific objections opponents raise but instead are usually idealistic or hypocritical assurances that our "foreign policy" will leap forward in effectiveness once it is ratified. Sen. William Proxmire (D-Wis.), the treaty's leading advocate in the Senate, has said this at least a thousand different ways on that many different occasions. If we were to admit that the presumed good effect of our ratification of the GC on foreign nations is more important than its certain ill effect on the American people and the damage it will do to our Constitution, we would agree.

This theme is to be found in the urgings of all proponents, official and journalistic. Former Supreme Court Justice Arthur J. Goldberg believes that there are three urgent reasons why the GC must be ratified. He gives them as follows:[4]

(1) "It outlaws action that is repugnant to the American people." (It does no such thing.)

(2) "Our failure to adhere to this Convention is an unnecessary diplomatic embarrassment." (Then we need better diplomats.)

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[1] Congressional Record, House, Mar. 24, 1966, p. 6365.

[2] This was the reason given by Sen. Richard M. Nixon for his opposition to the treaty in the '50s. (Letter dated May 3, 1951 to Florence Lyons.) However, President Richard M. Nixon approved the treaty and attempted its ratification in 1971.

[3] Remarks, Rep. John R. Rarick, Congressional Record, House, Mar. 12, 1970, p. H1756.

[4] Statement before the Senate Foreign Relations Committee, May 26, 1977.

> (3) "Our adherence to the GC can make a practical contribution to the long and difficult process of building a structure of international law based on principles of human dignity. It will put us in a better position to protest acts of genocide in other parts of the world and will enhance our influence in United Nations efforts to draft satisfactory human rights principles." (Nonsense.)

You are invited to interpret for yourself the profound philosophical maunderings of William F. Buckley, Jr., as he gives his weighty support to the GC:[5]

"Nonideological enemies of human rights are much likelier to benefit from stipulated definitions of human freedom. Norms achieved by the more civilized states after millennia of agonizing experience are a part of the universal patrimony. If and when human rights finally arrive in nations like Chad and Iran, it will be because of the idealism of those who have fought for universal declaration of human rights."

In short, the GC is not meant to and cannot stand on its own merits; it is a political document meant for propaganda.

In addition to the airiest ideological internationalism, the proponents of the GC have one other argument—the faithful *ad hominem* approach. Opponents hold a lower level of morality, perhaps slightly cuckoo. Former Sen. Abraham Ribicoff (D-Conn.) thought that "opponents of the Genocide Convention are perhaps very rabid isolationists who are frightened by the possibility that American citizens may be subjected to justice at the hands of a court other than an American court."[6]

The Washington Post once theorized that "a cabal of southern lawyers" was behind the opposition of the American Bar Association which "left an unsightly stain on the good name and the high pretensions of this nation."[7] It is to be expected that proponents will accuse opponents who want only to preserve the American Constitution of being rabid racists.

Americans must beware of attempts to change this divinely-inspired document for any reason. More, we must be doubly suspicious of attempts to change it insidiously and dishonestly, which is what the Genocide Convention is all about. There can be no greater authority for this caution than George Washington, who said in his Farewell Address:

"If, in the opinion of the people, the distribution or modification of The Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way The Constitution designates. But let there be no change by usurpation: for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed."

Hold on to the Constitution

The past two centuries have been the most eventful in all of history. Invention and the industrial revolution brought Europe to a fever pitch of imperialism, wars and revolutions, the energy from this spreading out to the whole world and all of mankind. Practically every government in the world, through this violent time, has suffered radical change. Only one has endured, a government solidly based on the spirit of liberty under law, a Gibraltar of stability and hope for all the world—the government of the United States of America, created and given life by The Constitution.

Yes, there have been vast changes in the interpretation of The Constitution. Many would say that every amendment to it after the tenth weakened its vitality. But still, The Constitution remains, the very foundation of our sovereignty, our liberty, our hope for the future. Without its prestige we could not escape the alternative: the deadly whirlwind of anarchy and tyranny.

Back to ground level

Ironically, the two most infamous cases of forced movement of peoples in the 20th century—genocide by the definition of the GC—took place under the aegis of the Western powers. After World War I there was a forced mass movement of Greeks from Turkey and Turks from Greece. Hundreds of thousands of families were ruthlessly uprooted in this process, which was carried out under the auspices of the forerunner of the UN, the League of Nations.[8]

But the most flagrant example of forced evacuation—genocide by the terms of the GC—took place upon the command of the powers which formed the United Nations itself—in fact, directly under the fledgling UN! This was the incredibly cruel forced evacuation of some 12 million Germans from areas in eastern Europe where they had lived since the time of William the Conqueror. Ethnic Germans from Czechoslovakia, Hungary, Silesia, Pomerania, East Prussia and other territories taken by the communists were evacuated with only the possessions they could carry. At least two million died in this movement, which went on from 1944–1947. There was no military justification at all for this terrible holocaust, which was decided at the Yalta conference.[9] Genocide, it appears, lies in the eye of the beholder.

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[5] Column, Chicago Daily News, June 21, 1977.
[6] Congressional Record, Senate, Dec. 16, 1970, p. S20387.
[7] Washington Post editorial, June 1, 1970.
[8] Europe 1914–1939, F. Lee Benns et al. Meredith, N.Y., 1965.

We finish this section with a quotation from Alfred J. Schweppe, a distinguished attorney who opposed the GC for many years but who was unable to enter the Washington Post's "cabal of southern lawyers" because of an accident of birth—he lived in the state of Washington. Testifying before the Foreign Relations Committee for the ABA in 1971, he said:

"Far from being an exercise in leadership by the United States, the cold record shows it to have been a pathetic case of abject followership—so pathetic as almost to drive one to tears.

"The United States delegation consistently caved on important matters of principle and in order to get some kind of an agreement—any kind—abjectly acquiesced in a draft that is so faulty and confused that it does not prevent genocide where it regularly goes on (Czechoslovakia, Hungary, Poland, Africa, Asia) but in a welter of confusion, creates new international crimes (the treaty becomes the supreme law of the land) that will make endless trouble for the United States. . . .

"Let me particularize a bit.

"As originally drafted, the convention included 'political' as well as 'national, ethnical, racial and religious groups.' The Soviets announced that they wouldn't play unless 'political groups' were expunged from the draft. They insisted on preserving the right to assassinate and exterminate the political opposition as essential to the safety of the state. . . .'

"Next, in the historical development of the convention, United States representatives insisted that there should be included in the definition of genocide the words 'with the complicity of government,' an obviously correct ingredient when related back to the Hitler massacres by Nazi Germany. But the communists would have none of it, because their governments themselves are the active agents in dealing with dissidents. Result: this United States position was rejected and the United States acquiesced. . . .

"We also acquiesced in the injection of 'part of a group.' Thus genocide under this draft can now be committed under the draft treaty by a single individual against another single individual—now a domestic crime, but lifted by this convention to the level of an international crime, triable in the country where committed.

"Then our representatives acquiesced in injecting 'mental harm' into the convention, thus opening the way for a Pandora's box of claims."

III

THE GENOCIDE CONVENTION, IN SPITE OF ITS PROPOSED "UNDERSTANDINGS" AND IMPLEMENTATION LEGISLATION, WOULD OVERRIDE THE CONSTITUTION AND BILL OF RIGHTS

(What the Genocide Convention would do)

Treaties override the Constitution

Article VI of The Constitution provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

John Foster Dulles, Secretary of State under President Dwight D. Eisenhower, declared:[10]

"The treaty-making power is an extraordinary power liable to abuse. Treaties make international law and they also make domestic law. Under our Constitution treaties become the supreme law of the land. They are indeed more supreme than ordinary laws, for congressional laws are invalid if they do not conform to the Constitution, whereas treaty laws can override the Constitution. Treaties, for example, can take powers away from the Congress and give them to the President; they can take powers from the state and give them to the federal government or to some international body and they can cut across the rights given the people by the constitutional Bill of Rights."

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[9] Nemesis at Potsdam, Alfred de Zayes, Routledge & Kegan Paul, London, 1977.

[10] Letter from Dean Clarence Manion to Washington Post, June 16, 1970. Although the statement was made before he became Secretary of State, he reaffirmed this position personally to Dean Manion during the Senate Judiciary Committee hearings on Apr. 6, 1953.

Thus, the provisions of the Genocide Convention, a treaty, would create a new law which Congress must implement and courts would be obliged to sanction.

What is "mental harm?"

One of the most objectionable parts of the GC is Article II, (b), defining "mental harm" as genocide. Phyllis Schlafly commented on this in her September, 1977 newsletter:[11]

"The undefined 'crime' of 'causing mental harm' is the joker which has consequences which are unpredictable and unlimited. Here are some examples of accusations which have already been alleged to come under the jurisdiction of the Genocide Convention.

"At a World Council of Churches meeting in Barbados, Protestant and Catholic missionaries were charged with 'genocide' on the ground of their alleged 'contempt for indigenous cultures, appropriations of Indian national resources and the overlording spirit of the missionaries.'

"A San Francisco lawyer who represented the Black Panthers announced that he had plans to go before the United Nations and charge the United States with 'genocide' against the Panthers. Chicago policemen were falsely accused of trying to exterminate the Black Panthers. The policemen got a fair trial in Chicago and were exonerated. Who knows what the result would have been if they had been extradited to some foreign country and tried without the safeguards of the U.S. Bill of Rights?

"If the Genocide Convention is ratified, our law enforcement agencies may be reluctant to take any action against any person who belongs to any identifiable group which might retaliate with charges of 'genocide.'

"Language so broad and vague as 'causing mental harm' could well be held by some World Court to characterize racial segregation prior to 1954 as 'genocide,' and therefore a 'crime' to be tried in a foreign court. In *Brown* v. *Board of Education*, the U.S. Supreme Court held expressly that separation of black children 'from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . . (and) has a tendency to (retard their) education and mental development.'

"Article III of the Genocide Convention is so broad in its language that no overt act need occur for the 'crime' of genocide to be committed. It reads: 'The following acts shall be punishable: (a) genocide: (b) conspiracy to commit genocide; (c) direct and public incitement to genocide; (d) attempt to commit genocide; (e) complicity in genocide."

"It is easy to see that, when the prosecution lawyers tie in all these subjective elements in Article III to the loose definition of genocide in Article II (wherein genocide is defined to include 'inflicting on a group conditions of life' which might bring about its destruction 'in whole or in part,' etc.), Mr. Schweppe is exactly correct in advising the Senate Foreign Relations Committee that the Genocide Convention will open a Pandora's box that could plague us for all time."

One of the group cited by Mrs. Schlafly, William Patterson, later wrote a book, "We Charge Genocide." He claimed that "the psychological impact . . . of jim crow and segregation in their subtle and covert forms does extreme mental harm to the group."[12]

A frightening possibility

As this is written, there is a lawsuit in Los Angeles wherein the plaintiff is alleging "Intentional Infliction of Emotional Distress," among other things, because the defendant, the Institute for Historical Review—an association of revisionist scholars and historians—has printed academic writings which deny that the Germans engaged in mass extermination of Jews during World War II.[13]

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[11] The Phyllis Schlafly Report, Box 618, Alton, Ill. 62002.

[12] Statement by Eberhard P. Deutsch to the Foreign Relations Committee as reported by Sen. Sam J. Ervin. Congressional Record Senate, Mar. 16 1971, p. S3311.

[13] Newsletter, Sept., 1981. Institute for Historical Review, P.O. Box 1306, Torrance, Ca. 90505.

To document his alleged distress, the plaintiff has had a psychiatrist prepare a statement for the court which claims that the plaintiff has suffered greatly from the publications of the institute, having been irredeemably scarred psychologically by his experiences in German internment camps, which he is forced to relive each time he hears or reads of someone who sets forth the findings of the institute.

The plaintiff is asking the court to take judicial notice that the "holocaust" did, indeed, occur. If the court should do so, unless the verdict is won on appeal, it would be unlawful for anyone in the United States to publicly make such statements, which would be obviously contrary to the First Amendment of the Bill of Rights.

Fortunately, there is little chance that any U.S. court, no matter how liberal, would make a ruling in such clear violation of traditional American principles of freedom of speech. However, should the GC be ratified, how long would it take for someone to allege "serious mental harm" caused by such speech, and what would be the expected verdict of the World Court—or of an American court anxious to "make a practical contribution to the long and difficult road of building a structure of international law based on principles of human dignity," to quote Ambassador Goldberg?

Extradition

The mood of the proponents of the GC is revealed by the rejection, in 1971, of a proposed reservation to the GC proposed by Sen. John Sherman Cooper (R-Ky.) by a vote of 7 to 6. The rejected reservation provided that U.S. citizens could not be extradited to another country to stand trial for alleged acts of genocide unless the Secretary of State determined that the accused American would be guaranteed all the constitutional rights of an accused under U.S. laws.[14]

The question of extradition is closely bound up with the whole question of the GC. Again, we turn to Mrs. Schlafly for her cogent observations. Discussing Article VI of the GC (See Appendix), she says: [15]

"This wipes out the protections that American citizens now enjoy under our Bill of Rights. Individual American citizens could be charged with the loosely-defined 'crime' of genocide, and then tried in some international court outside of the United States.

"Furthermore, our Government will be required, under the terms of the Genocide Convention, to extradite any citizen charged with genocide to the jurisdiction of some foreign court, whether the charge is trumped up or not. Article VII spells this out emphatically: 'Genocide and the other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition. The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.'

"The usual defense against extradition to a foreign country is that the charge is political and therefore non-extraditable. However, the language of the Genocide Convention prevents that from being used as a shield to protect American citizens unjustly charged.

"Is anyone so naive as to assume that the precious guarantees of the U.S. Bill of Rights would be respected in some foreign or international tribunal? Our unique American guarantees—such as the right to be charged for a capital crime only after a grand jury indictment, the right to a speedy and public trial by an impartial jury in the State and district wherein the crime is alleged to have been committed, the privilege against self-incrimination, the protection against unreasonable searches and seizures, the writ of habeas corpus, and the right not to be denied life or liberty without due process of law—would be meaningless in a foreign court.

"When an individual is extradited for a crime, no rights go with him. He is subject to the rules and the decisions of the court to which he goes. There is absolutely no sound argument for making American citizens subject in any way to the World Court which includes jurists from Communist and pro-Communist nations, including the Soviet Union and Poland."

Repeals the Connally reservation

Ratification of the GC would have the unfortunate but certain side-effect of repealing the Connally Reservation, six key words inserted into the resolution accepting the jurisdiction of the World Court in 1946. Because of it, the U.S. will not accept compulsory World Court jurisdiction in "matters which are essentially within the domestic jurisdiction of the United States **as determined by the United States.**" The boldface type are the six words. Without them, the World Court would make its own determination of what is to be deemed domestic and foreign matters, subjecting American citizens to the jurisdiction of aliens. Article IX of the GC accomplishes this repeal (See Appendix II).

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[14] The Washington Post, Mar. 31, 1971.

[15] Schlafly, op cit.

Eberhard P. Deutsch, an attorney who fought like a tiger for many years to prevent the ratification of the GC, said: [16]

"If the U.S. should ratify the convention, and a case should arise thereunder which our Supreme Court should hold to be one within this country's domestic jurisdiction and protected by the First Amendment to our Constitution, any party to the treaty could still bring the matter before the International Court of Justice, which could disregard completely the decision of our Supreme Court, and hold that the matter was not one of domestic jurisdiction and not protected by the free-speech guaranty of the Constitution—and the United States would be bound by that decision. . . . (The GC) places in the hands of foreign nations whose peoples have never known such freedoms as are guaranteed under the Constitution of the United States, the power to judge whether those freedoms are being protected properly within our domestic borders."

Meaningless ABA "understandings"

After 26 years of failing to ramrod the GC through the Senate, the American Bar Association labored and came up with its specious "Understandings and Declaration" which are reprinted in Appendix III. Clearly, these "understandings" (not even reservations) are not meant at all to confront and answer the grave deficiencies of the GC but to plaster over it a facade of misleading and thoroughly dishonest gloss in order to deceive Americans making a superficial inspection of the GC as it now exists and to allay apprehension. The ABA's deceitful "understandings" are an insult to the intelligence of even a superficial observer and a gross betrayal of American interest.

As Frank Capell put it forcefully in the "Herald of Freedom" (Mar. 20, 1970): [17] "What the United States understands is of no importance at all except in convincing the Senate to ratify it in the first place. After it is signed it is what is stated rather than what the U.S. 'understands' it to mean that counts." (Panama has already repudiated senatorial "understandings" tacked on to the canal giveaway to secure its financial hold on the U.S. as concerns canal operations.)

Understanding 1 for example is deceptively addressed to the very real problem of "how many" members of a group does one have to "injure" according to the peculiar meaning of the GC. The answer, it says, is "a substantial part of the group." Who is to determine how many "a substantial part" may be is not revealed. The World Court, no doubt. And by what standards of judgment?

Understanding 2 purports to define what "mental harm" means. The answer, the ABA tells us, is "permanent impairment of mental facilities," totally meaningless jargon, of course, to be defined by the court of jurisdiction.

Understanding 3 purports to give the U.S. the "right" to bring to trial any American citizens who may commit "genocide" outside the country—again subject to the jurisdiction of the World Court. If the U.S. does not choose to take the "right," the citizen would be seized and prosecuted by a UN court or the country where the "offense" occurred.

Clearly, Article IX of the GC gives to the World Court the untrammeled power to make all decisions concerning the interpretation and application of the convention. The ABA's so-called "understandings" are so obviously worthless that it becomes legitimate to question what the true motivations are of the "experts" who drafted them.

The ABA's "understandings" state that prior to the deposit of the instrument of ratification of the GC with the UN, there is to be legislation to implement it. This proposed legislation is printed in Appendix IV of this white paper.

Implementation legislation

To analyze this without feeling cold chills down your back means that you don't understand it. Keep in mind that the interpretation of the GC will be in the hands of the World Court—in no way responsible to Americans and without an understanding of the American Constitution and legal system—once the pride and hope of the world, presumably including the American Bar Association.

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[16] Congressional Record, Senate, Mar. 16, 1971, p. S3313.

[17] P.O. Box 3, Zarephath, N.J. 08890.

To comprehend the problem, consider the "progress" of the federal government as it extruded its interference into state affairs. Legally, the process rested on the interpretation of the "interstate commerce" clause of Art. I, Sec. 8 of the Constitution. In time, the Supreme Court held that dealing in or using any product that was manufactured in another state constitutes interstate commerce and places the subject under federal jurisdiction. Thus, Washington over the years has grabbed hold of just about everything it wants to grab.

And such is the nature of bureaucracy. Can one seriously believe that the World Court will not seek to extend its jurisdiction into every nook and cranny of American life so long as American taxpayers are willing to pay for and tolerate this destruction of their liberties? Apparently only graduates from law schools are unable to perceive this fact, and to predict what is to follow from the incredible folly of permitting even the slightest diminution of American sovereignty.

Sovereignty is the most precious attribute of American citizenship. That a bunch of lawyers would carelessly throw it on the garbage heap of history does no credit to the profession.

Or is it that the lawyers see the expansion of legal work that will come from the increased litigation sure to come? And to hell with national sovereignty.

The implementation legislation is transitory at best and essentially meaningless because Article IX of the GC dominates and controls it.

Vienna Convention on the Law of Treaties

Robert Morris, writing on April 15, 1971, brings forth the question of another international convention which obviously bears on the impact of the GC. He says:[18]

"On April 24, 1970, the U.S. signed the Vienna Convention on the Law of Treaties. In article 27 it provides, 'A party may not invoke the provisions of its internal law as justification for its failure to perform the treaty.'"

Liberty Lobby has made no study of this treaty but if what Judge Morris says is true, and we do not doubt it, the subject needs to be closely studied, as this alone would seem to make the ABA's "understandings" nonsense.

IV

WHAT ARE THE REAL MOTIVATIONS FOR THE GENOCIDE CONVENTION?

(What are they doing to us and why?)

Because of space limitations, we have not covered many other aspects of the GC which are negative in their effect upon Americans and America, such as the status of our officers and enlisted men, who are certain to be charged with "genocide" in the fulfillment of their duties. Also, the harmful effect it will have on military discipline.

Even without ratification, the record shows numerous instances of charges of "genocide" against Americans, mostly instigated by the Communist Party. It should be easy to project what is in store. The following is an incomplete list of such accusations:

December 12, 1969. Time reports that the Black Panthers plan to go to the UN to charge genocide against the U.S.

July 15, 1970. The National Laymen's Digest reports that a group calling itself the Continuations Committee of the Chicago Emergency Conference to End Repression—a communist front—is petitioning the UN to sit in judgment of the U.S. on a charge of genocide.

November 5, 1970. Frank Capell's Confidential Intelligence Research Memo reports that the Emergency Conference Committee, 32 Union Square W., New York City, is passing a petition which charges the U.S., state and city governments with genocide and demands that the Senate ratify the GC.

May 8, 1971. The New York Times reports that the Brownsville Community Council, identified as "the principal antipoverty organization" in Brownsville—an all-black area of New York City—charges Gov. Nelson Rockefeller and the entire state legislature with "genocide" it said was foretold by state budget cuts.

December 21, 1979. The Workers World, a communist paper, reports that an emergency demonstration was held at the UN by various groups of American

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[18] Manchester Union Leader, Apr. 15, 1971, p. 20.

Indians charging "many different forms of psychological, spiritual and physical genocide."

The above does not include numerous charges by North Vietnamese accusing the U.S. of genocide in Vietnam. If the U.S. had been a party to the GC at the time of the My-Lai incident, Lt. Calley and the other accused parties would probably have been accused of and tried for genocide under the GC, rather than by traditional American procedure.[19]

The International Court of Justice

Quietly resting behind a smokescreen of rhetoric all these years are the interrupted plans for the establishment of a so-called International Court of Justice, the purpose of which will be to try cases of accused genocide. GC proponents have often mentioned that as no such tribunal has been set up there is no reason for anyone to be apprehensive that such a tribunal will ever be established.

This, however, appears to be another ploy in the internationalists' well-stocked bag of tricks to get the GC ratified without too much public alarm. But once the Senate has placed the manacles of international control over the American people by the GC's radical dilution of our national sovereignty there is no reason we know of to think that the delay of the past 32 years will be anything but a pleasant memory.

The chances for ratification

Can the American public assert its collective will and stop the ratification of the GC this time? They have done so in the past—even after predictions by all the media of certain victory for the internationalists.

The strategy which proponents have always relied upon is that of fait accompli—aiming to ratify the treaty before opponents can alert the patriotic opposition. Sadly for them, however, they have so far been unable to railroad the treaty through the Senate before the opposition began mushrooming.

The situation is akin to a mouse who controls the button of the mass media against an elephant who takes months to awaken. If the internationalists can throw the treaty onto the floor of the Senate and railroad it through before the people know what is happening, they will win and the American people will lose. But if they cannot get an immediate vote, public opposition will swamp them.

This is shown by the surprisingly frank admission by Sen. Proxmire, reported in the Washington Post on August 12, 1979: some senators have said they would support the treaty if it comes up in a non-election year—which means that 1980 doesn't look good.

"It is a mystery to me," Proxmire said, "why we can't get this ratified. For years, we had the opposition of the American Bar Association and Sen. Ervin, which made it very tough. But the ABA now supports the treaty and Sen. Ervin has retired. The only opposition comes from Liberty Lobby, the John Birch Society and some far-out groups of that sort." But could it be that it is Sen. Proxmire and his fellow internationalists are out of step with the mood of the public?

America first

The renewed drive for ratification of the GC this year has a very good chance of success in spite of the undoubtedly more nationalistic mood of the public. In 1971, Sen. Ervin was moved to say, "A substantial part of the American people wish to contract rather than expand their international obligations."[20] If this was true in 1971 it is even more true today, as intervening political events have abundantly shown.

No doubt this is why the Establishment media has launched a heavy artillery barrage of smear against those institutions and organizations which in the past have led the fight against ratification. This is expected to soften up their opponents and make it possible for the treaty promoters to advance over the ground they have been defeated on for the past 32 years.

Analysis and conclusion

It is clear that the ratification of the GC will in no way serve the interests of the United States nor those of the citizens, voters and taxpayers. The only argument for it reduces to infinitely repeated assertions that it will somehow aid our "foreign policy"—an elusive thing which itself has not been defined. Although it has never actually been voted on (its managers usually withdraw it before a vote because they do not wish the embarrassment of an actual defeat) it has been through hearings in the Senate Foreign Relations Committee four times, with more hearings to be held this year. Predictably, the committee—dominated by internationalists—will report it out favorably. (See Appendix V for list of committee members.)

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[19] ABA appraisal. Congressional Record, Senate, Feb. 25, 1970, p. S2321.
[20] Congressional Record, Senate, Mar. 16, 1971, p. S3310.

The tidal wave of constituent outrage against the GC will flow once again, assuming that there is time for it to build, and if the "democratic" system we allegedly have in this country shows more vitality than it did when the Senate threw away the Panama Canal in defiance of public opinion, then again the GC will fail.

Liberty Lobby not only favors the rejection of the treaty but also its repudiation and its physical return to the UN. So long as it languishes in the Senate Committee on Foreign Relations it will be periodically dug up and trundled out.

Senator Boschwitz. Senator Pell, do you have any comments or questions?

Senator Pell. I do, but I would proceed after you, Mr. Chairman.

Senator Boschwitz. Why do you not go ahead first, Senator, please. But first, I note that Mr. Gardner has to leave at 12:15. We have after this a panel from the ABA, is that correct?

Senator Pell. Yes.

Senator Boschwitz. The panel will address some of the legal questions, so that we do not have to detain Ambassador Gardner.

Why do you not go ahead, Senator.

Senator Pell. I would imagine Ambassador Gardner could leave as he wishes. I just wanted to welcome him very much. He is wearing his scholarly hat now, as opposed to his diplomatic, ambassadorial one, which he wore the last time we welcomed him here. I would say that we miss him in that capacity, but welcome here in this.

Mr. Bartell, you mentioned the fact that mental harm is hard to define. I thought one of the resolutions we had the last time around was that the U.S. Government understands and construes the words "mental harm" appearing in article 2B of this convention to mean permanent impairment of mental faculties. This would certainly be perhaps what the Soviet Union is doing to people in mental hospitals in Russia. But it is not the telling of a Polish or WASP or any other kind of joke in this country, would you not agree?

Mr. Bartell. I do not argue with that, Senator, other than that mental harm is brainwashing. Permanent mental harm is an experience that stays with you the rest of your life, yet you may well qualify to do everything other than carry this harmful brainwashing with you.

My problem is probably semantic in that sense, in that I think it is terribly difficult to determine precisely what is meant by it to any one individual.

Senator Pell. Ambassador Gardner?

Ambassador Gardner. Before I depart, Senator, may I be permitted to respond to your question?

Senator Pell. Please.

Ambassador Gardner. One of the central flaws in the argument that we have just heard about mental harm is that it ignores the plain language of article 2. Mental harm can only be cited in a complaint of genocide if it is one of a number of acts committed with intent to destroy in whole or in part the national, ethnical, racial, or religious group.

The objection we have just heard acts as if the term "mental harm" were listed in the convention by itself as a kind of genocide. It is only something relevant to the charge of genocide if it is an act committed with intent to destroy a group.

And in the legislative and drafting history of this convention, it is made unmistakably clear that the term "mental harm" means permanent impairment of mental facilities. Therefore, the interpretation urged by Senator Pell is exactly four-square in line with the meaning of this treaty, as made clear by the drafting history.

Senator PELL. I appreciate that response from such a distinguished lawyer as you are.

What would be Mr. Bartell's reaction?

Mr. BARTELL. In the "Journal of Social and Political Science," which I quoted in my testimony, Senator Ervin in previous hearings objected to the vague language in the treaty. He says what "mental harm" means in this context is totally incomprehensible.

Now, in order to illustrate the nature of the terminological problems, some have cited a 1954 *Brown* v. *Board of Education* decision, in which the Supreme Court ruled that the education of black children in separate black schools "may affect their hearts and minds in a way unlikely ever to be undone and has a tendency to retard their education and mental development."

I am still quoting:

> Thus, using our own judicial opinions as a handle, Eberhard P. Deutsch of the American Bar Association contended that an international tribunal could claim that "any form of local segregation is within the definition of the international crime of genocide under the convention."

So I think regardless of whether you say we have clearly defined for purposes of a resolution what mental harm is, I think it leaves it in great obscurity.

Senator PELL. Well, I would disagree with you.

Let me move on next to a question of constitutional law. Is it possible for a treaty entered into by the United States to override or supersede the Constitution, including our Bill of Rights? In other words, can any treaty override the Constitution?

Mr. BARTELL. It was the opinion of Senator Ervin for many years that this was the case; yes. He said the genocide treaty would override the Constitution and would adversely affect the Bill of Rights.

Senator PELL. Pursuing that thought a moment further, has the Supreme Court ever ruled that a treaty was superior to the Constitution?

Mr. BARTELL. Indeed it has. It also has ruled conversely.

Senator PELL. Could you give me the citations and refresh my memory?

Mr. BARTELL. I think that is in my written testimony.

Senator PELL. Perhaps I was casting my vote on the floor of the Senate at the time you cited that.

Mr. BARTELL. In my written testimony, Senator, I cited *United States* v. *Pink*, *1942*. There a treaty was ruled to be the law of the land and executive agreements were given similar dignity.

We addressed the question when Senator Bricker introduced the amendment to the Constitution to settle the issue once and for all.

Senator PELL. But what we are talking about here is the Constitution. I am not talking about the law of the land. What I am saying is, where is there an instance of the Supreme Court ruling that a treaty is superior to the Constitution. That is not answered by your statement.

Ms. **Katson.** I think the important thing to remember here is that, although the Supreme Court did rule in 1957 that treaties would not override the Constitution, that that is not sufficient enough in our view to protect our constitutional form of government.

Other individuals apparently feel that way also, as we mentioned in the testimony before. Congressman Ashbrook has introduced legislation which would amend the Constitution to assure that treaties would not override the Constitution.

Senator **Dodd.** But if the Senator would yield, that is not addressing his question. The question was: Can you cite any precedent whatsoever where the Supreme Court has held that a treaty supersedes the Constitution of the United States? I do not want someone else's opinion, no matter how distinguished a Member of Congress he might be.

Senator **Pell.** I just wanted one instance of it. That is what I was asking you for.

Mr. **Bartell.** Well, it was our view that the *United States* v. *Pink* decision did that.

Senator **Pell.** But that does not talk about the Constitution. I am asking for an example, and submit it for the record if you cannot finger it precisely here, although I am surprised you cannot do it here. Please give one example supporting the statement, saying that the Supreme Court can rule that a treaty with a foreign government is superior to our Constitution.

Mr. **Bartell.** I shall diligently attempt to do that for you, Senator.

[The material referred to follows:]

In *Missouri* v. *Holland* of 1920, the Court decided that the treaty involved was not limited by the 10th amendment, thus effectively overriding the Constitution.

Senator **Pell.** Thank you. I do not want to hog the time here, so I will pass.

Ms. **Katson.** I just wanted to mention that if this were a settled issue in the sense that everyone was assured that treaties could never override the Constitution, I wonder why there have been measures since, including the one I mentioned by Congressman Ashbrook, to amend the Constitution. Apparently he seems to feel that there is no absolute guarantee of that at this time.

Senator **Percy** [presiding]. I am going to ask if the American Bar Association, in the absence of Ambassador Gardner, if one of your members or two of you would please come up to the witness table, take a chair, and identify yourselves and perhaps address yourselves to this same question that was put by Senator Pell and Senator Dodd to Mr. Bartell.

Senator **Boschwitz.** Mr. Chairman, I have to leave once again. I apologize for not being able to hear the testimony of the American Bar Association. I will, however, review it.

I would be most interested in seeing whether or not a direct citation can be found about the Supreme Court. I am not a lawyer, not a practicing lawyer, but I would like to get a direct citation which says that a treaty would override the Constitution, which to me is almost a criticism of itself.

But frankly, I hope that I will be given, together with you, some adequate attention in the Spotlight and others, because I consider the arguments that I have heard this morning to be really complete mumbo-jumbo. To say that Daniel Webster pointed out that the United States is the last hope of the world and if we ratify this convention that hope is going to fade away, and that rank treason is involved with respect to this treaty, I think is just unworthy of testimony to come before this committee. It is, as I said, mumbo-jumbo.

I apologize that I have to leave, Mr. Chairman, but I must.

The CHAIRMAN. We will read into the record the exact words taken from the Emergency Liberty Letter. I do not see a date—oh, September 10, 1981: "If ratified, the misnamed genocide treaty would override the Constitution."

Could we have comment from Mr. Moore, Mr. Bitker, or Judge Buergenthal, from any of the ABA representatives, on that?

Senator DODD. Mr. Chairman, let me ask if I am going to get a chance to talk to Mr. Bartell before he leaves?

The CHAIRMAN. You will. But we are on our first round. I have not yet asked my questions. Senator Pell has completed his. Certainly if you have a need to leave, I would yield to you.

Senator DODD. Oh, no, I am going to be right here.

The CHAIRMAN. Thank you.

Ambassador MOORE. Thank you, Mr. Chairman. I am assuming that you simply wish us to respond to the one point as to whether the treaty would override the Constitution of the United States?

The CHAIRMAN. At this point, yes.

Ambassador MOORE. I have listened with some interest to some of the legal arguments made against the treaty and indeed have a list of some eight of these that I think I could briefly respond to. But let me at this point address solely that one question.

The law of the United States is absolutely settled with the leading decision of *Reid* v. *Covert* that a treaty can in no way alter the Constitution of the United States. In that sense, it is absolutely no different from any other legislation, which can in no sense alter the Constitution of the United States, which is clearly the highest authority to be applied by any court in the United States.

The decision that has been suggested on the other side as an authority, that of the *Pink* case, *United States* v. *Pink*, is indeed not an authority, Mr. Chairman, for that point. The *United States* v. *Pink* case relates to the power of the President with respect to executive agreements, and it depends on a determination by the Supreme Court that, in fact, the Constitution permits the President to have certain kinds of scope with the executive agreement power.

It is in no way a decision that, for example, a treaty or any kind of executive agreement would be inconsistent with the Constitution of the United States. I would regard that as a principle of enduring significance for the U.S. Republic and would indeed be extremely surprised were that principle ever to be changed in the future.

The CHAIRMAN. On another point along that same line of reasoning started by Senator Pell, in the judgment of both of you would this treaty provide the authority to surrender American citizens to be tried on criminal charges by an international court? What would be required for such authority to be granted to an international tribunal if one should ever be established?

Mr. Bartell, would you want to start on that?

Mr. BARTELL. Senator Percy, like Senator Boschwitz, I am not an attorney. Neither is my colleague. However, if I can return to the previous issue just for a second, in the written testimony I think the point that we make, that Senator Bricker introduced an amendment to the Constitution in 1954 and it lost by a single vote, is indicative of the fact that controversy remains whether treaties supersede the Constitution or override the Constitution. I think there is a great question about that.

Now, on the question of extraditing for punishing American soldiers for fighting in a war, this was the question that was asked, was it not?

The CHAIRMAN. That was as to whether or not this treaty did provide authority to surrender American citizens to be tried on criminal charges by an international court.

Mr. BARTELL. Legally, I have no opinion on this. But I can only quote——

Senator PELL. Excuse me, but I would say, since you are not a lawyer, the chairman is not a lawyer, and I am not a lawyer, we are only fortunate enough to have one lawyer with us on our panel, Senator Dodd.

The CHAIRMAN. But the Liberty Letter emergency document was addressed mainly to nonlawyers. It says this treaty deprives—

> American citizens of the right of trial by an American jury, freedom of speech, and of the press. For example, if you were accused of causing 'mental harm' to someone, you could be arrested by United Nations police, hauled in chains to a foreign country and forced to stand trial before an international tribunal.

I am just quoting exactly from the Emergency Liberty Letter that goes out, I presume, to tens of thousands of people, few of whom are lawyers.

Mr. Moore, would you care to answer for the ABA, or would any of your colleagues care to answer that question? Or Mr. Bartell, would you prefer to answer it now?

Mr. BARTELL. I would like to say that the language may be colorful—[laughter].

The CHAIRMAN. My only question is, Is it accurate? Is it true?

Mr. BARTELL. There is a significant body of thought in this country that says, yes, that is exactly what can happen, including Senator Sam Ervin, who says that American servicemen can be tried by a foreign court.

Senator PELL. On what authority?

Mr. BARTELL. On the authority of the Genocide Treaty.

Senator PELL. If you read the treaty, I do not see any authority in it. Would you cite where the authority is in the treaty? We have to be specific on these things and not purely subjective. Where is the authority in the treaty?

I have it right here and have read it. Have you read the treaty, sir?

Mr. BARTELL. Of course I have read the treaty.

Senator PELL. Well then, where is the authority?

Mr. BARTELL. The basis upon which Senator Ervin made his statement is not clear to me. I do not know precisely where he got his information. I do not have that information with me in a document today.

Senator PELL. I am asking you, where in this treaty is the authority for your statement?

Ms. KATSON. As we said in our testimony, it is well known that the treaty itself does not provide for extradition of American citizens. However, as the legal adviser to the State Department, Mr. Hansell, said 4 years ago, we would be committed to add genocide on the list of crimes that are considered extraditable offenses.

So we have already said in our testimony that the treaty does not at this time do it, but that as a commitment we would be obliged to do so.

Also, I read a lot of letters that we get in from people all over America, and some of these letters have questioned, what is the purpose of having treaties that can extradite Americans for different crimes if it will not some day be implemented, which would necessitate the creation of an international penal tribunal. They are very concerned as to why such treaties that provide for the extradition of American citizens exist if there is no intention to do so.

The CHAIRMAN. We have now 90 treaties with 90 countries. We just adopted several more yesterday by a unanimous vote of the Senate of the United States. My understanding is that the present trend is, with respect to extradition treaties, whether or not genocide is an extraditable crime, it is really up to the U.S. authority to determine whether a U.S. national will be extradited to a requesting country pursuant to an extradition treaty or whether the case will be submitted to domestic authorities for purposes of prosecution.

Is that the understanding of the ABA?

Ambassador MOORE. Mr. Chairman, yes, it certainly would be my understanding, and I am sure it would be that of the ABA.

Let me in fact just summarize a series of reasons why it seems to me that your interpretation is absolutely correct. First, if you look at the language of article 7 of the genocide convention, it says that extradition shall be granted by the contracting parties, and I underline this, "in accordance to their laws and treaties in force." That makes it very clear that the obligation is one that is consistent with the laws of the individual nations that adhere to this treaty, and is intended to provide substantial flexibility.

That is a formula that appears in many different international treaties, including our NATO-type commitments on the use of force abroad.

Second, Mr. Chairman, even if in this case we were obligated absolutely, every single one of those extradition treaty changes would have to be approved by the appropriate constitutional processes in the United States, with presumably an appropriate opportunity by the U.S. Senate to examine those.

Third, there is no international criminal court at the present time. If we were to look at the international dimension—and I think Ambassador Gardner is correct that there is no reasonable prospect of any such international criminal court being created at the present time.

Finally, Mr. Chairman, I would like simply to ask the question on the merits of why is it that the concept of extradition for crimes committed abroad is necessarily something that we should be opposed to, provided that it is done with appropriate guarantees and safeguards on the kind of extradition involved.

If we look at the core, for example, of antiterrorism conventions and antihijacking conventions, for example, that is precisely one of the most important elements. It is precisely that we do want Libya to either prosecute or extradite those who have been involved in committing terrorist acts.

Genocide is certainly terrorism writ large. So I do not think, even on the merits of that, provided that there is appropriate guarantees for due process, that we should be concerned.

Finally, Mr. Chairman, there is an additional point. It is that the implementing legislation in this case makes very clear that the United States would also have a concurrent jurisdiction, and if it chose to exercise that jurisdiction, that is to bring a criminal trial itself under the provisions, there would be no obligation whatsoever to extradite. So we would always have the protection and full constitutional safeguards of ourselves trying any United States citizen that was accused by any foreign country with extradition sought.

The CHAIRMAN. I am going to come back to you, Mr. Bartell, and ask you a question. But I would like to precede it by just saying that I am reminded of 1964, when I was on television with Governor George Wallace. I was a businessman in Chicago at the time. We were debating for an hour the Civil Rights Act of 1964.

He made the statement that there was a provision in that Act that would require that every family firm hire a black man and fire the son if they had to. I threw down a bunch of papers on the table in front of us, in front of the television camera, and said: Governor Wallace, I will yield you the rest of my time on this program. You find that in there.

He never did find it. I told him later that I did not have any real papers with me. I just threw a bunch of papers down. But I knew that it was not there, anyway.

We became good friends. We are both hard of hearing and he and I exchange technical data all the time now on what is the best approach to use for the hard of hearing. We had a sharp difference of opinions on that particular law, however.

I wonder if you could find now the section in this Genocide Treaty that would go to this point and that would reaffirm the statements that you have made or that the Liberty Letter has made.

Mr. BARTELL. I think Ms. Katson probably answered the question already. I will go back to my testimony. Senator Bentsen says:

> I oppose ratification of the treaty because I do not want U.S. citizens subjected to extradition of other nations that may never have known our constitutional guarantees.

Senator Hayakawa says: "There seem to be several international interpretations of the treaty."

Senator Goldwater also speaks to this——

The CHAIRMAN. I do not think they are referring to the specific point that was raised.

Maybe we can ask Senator Pell and Senator Dodd, who were following up on that, to request more precision from you.

Senator PELL. I was asking you where in the treaty is the authority to take somebody away in chains for telling a Polish joke or a WASP joke or any other kind, and taking them to a foreign authority? Where in the treaty is this?

Mr. BARTELL. In order to make it an extraditable offense, Senator, obviously it is going to have to be implemented.

Senator PELL. Would you read me the language that gives the authority to do this, the treaty language? You have the treaty in front of you, do you not?

Mr. BARTELL. Yes; I have the treaty in front of me.

Senator PELL. Where is the language that gives this authority.

Mr. BARTELL. Obviously, there is no authority in the treaty itself. But if Mr. Hansell of the State Department, whom we quoted, is correct that at the present time genocide is not listed as an extraditable offense in any of our extradition treaties, we would have to negotiate a new or amend an existing extradition treaty.

"Would we be obliged to do that as a commitment?" Senator Case then asked. And he was answered: "Yes, as a commitment." That is the basis for our arguing that this would take place.

Senator PELL. Well, that is one man's opinion. We know what your opinion is, and Ambassador Moore's. And I would add, Mr. Moore is also an Ambassador. We are honored to have you with us again.

But I am asking. I would say that I may not be as bright as some, I am not a lawyer, and I am trying to find it in the treaty, although I have read it through several times.

Mr. BARTELL. I stipulated already that it does not say so specifically in the treaty.

The CHAIRMAN. Where also is the United Nations police force, the U.N. police that you mentioned as hauling someone off in chains?

Mr. BARTELL. Senator, I kind of feel that you are taking unfair advantage.

The CHAIRMAN. I am quoting from your official publication, Emergency Liberty Letter, dated September 10. And you are the spokesman for Liberty Lobby. You say the language is colorful, but I am saying that it is untruthful.

I am just asking you to prove your statements.

Mr. BARTELL. Do you deny that the U.N. has a peacekeeping force?

The CHAIRMAN. But you said police force. The U.N. does have a peacekeeping force. They are set up in the Sinai, for instance. They are stationed in the Sinai and that is the only place they are.

We have United Nations forces in other countries, between say Pakistan and Kashmir. But they are based there for peacekeeping. This seems to imply to people that there are United Nations police. The others are peacekeeping forces.

Mr. BARTELL. But what is a policeman? A policeman is a peacekeeper. Am I wrong?

The CHAIRMAN. Yes, you are kidding yourself, and you are trying to kid other people that there are United Nations policemen going around who can take people, citizens, off in chains, that they can haul them off. It just is not true.

Mr. BARTELL. It is not true now.

The CHAIRMAN. I do not think it is befitting of the many people whom I admire and respect who are members of Liberty Lobby. I do think that colorful language is one thing, but untruthful language that has no foundation, in fact is something else. That is what I am really trying to say.

As we go into this debate now, it it not possible for us to have the reasoning that you used in your testimony and not the sort of colorful language that goes out? The actual tesimony is heard by very few people, but this letter goes out to tens of thousands of people. It whips up the emotions. It does not play to the reason of people.

What authority, for instance, is required to extradite American citizens abroad to stand trial on criminal charges? Does the genocide convention provide such authority, for instance?

Mr. BARTELL. No.

The CHAIRMAN. Is that correct, Ambassador Moore?

Ambassador MOORE. That is correct.

The CHAIRMAN. So then, it does not. Would the convention obligate the United States to conclude extradition treaties, for instance, with such countries as Vietnam or Albania, or other countries with which we do not have treaties? Is there any obligation in this treaty that would require that we have extradition treaties with other countries that we do not choose to have them with?

Ambassador MOORE. No, Mr. Chairman, I would think there would not be, Mr. Chairman.

The CHAIRMAN. We have the option, as we had yesterday, to go into two more extradition treaties with two countries. But it was after a full airing and hearing in the Senate that we had a final vote. There is not anything in the Genocide Treaty that would require that?

Ambassador MOORE. The language of article 7 is rather clear on that point. It specifically says "in accordance to the laws and treaties in force." It is clear that there is no obligation to create a series of extradition treaties with nations where one does not have extradition treaties.

I think the most important thing, that is easily overlooked in this, is what happens when you negotiate an extradition treaty. It would be conceivable to us that the United States would negotiate an extradition treaty which would say, for example, that if the United States in the case of a U.S. citizen charged abroad wanted to try that U.S. citizen with all of the appropriate constitutional guarantees here in a U.S. court, that somehow that treaty would require us to extradite.

That is not our normal practice. That flies in the face of the very specific language of the implementing legislation that was prepared and submitted with this, Mr. Chairman.

The CHAIRMAN. Mr. Bartell, I want to make clear that I understand you do not personally edit the Liberty Letter. But I would hope that your own careful testimony would be during the next year setting a tone for the kind of debate that we will have. I hope we do not get into extremism. I hope that proponents of it do not go to extremism or colorful language that will in any way mislead people as to what this treaty actually is, either.

Mr. BARTELL. Obviously, this is a highly complicated and very legal matter, subject to broad possible interpretations.

Referring to the necessity for exercising treaties, if the United States does not want to, obviously, I would think the learned gentlemen of the bar were absolutely correct, that we would not have to. On the other hand, why would we want to conclude a treaty with Vietnam?

Yet, according to Senator Thurmond's testimony, they became a party to the convention on the prevention and punishment of the crime of genocide. That seems a little ridiculous to me.

The CHAIRMAN. Well, I am raising the point for that reason. We have a choice as to whether to go into a treaty. There is nothing in this treaty that would require that we enter into an extradition treaty with any country. That is our free choice, regardless of whether we have a genocide treaty or not.

Mr. BARTELL. Do you seriously believe, Senator, that by Vietnam signing the genocide treaty, there is not going to be genocide in Vietnam anymore?

The CHAIRMAN. But that does not mean that we have to sign an extradition treaty with Vietnam. And to the best of my knowledge, we do not have such a treaty. That is our free choice. We have that only with 90 countries. Out of 160 countries on Earth, we only have extradition treaties with 90 countries. And we have carefully selected those countries. We have left about half of the countries out for one reason or another.

Mr. BARTELL. Are you saying you could have the genocide treaty with a certain number of countries with which you have an extradition treaty as part and parcel of it, and a certain number with which you do not?

The CHAIRMAN. That is right. If we have no extradition treaty with a country, then it simply would not be effective.

Is that correct?

Ambassador MOORE. That is absolutely correct, as I read article 7, Mr. Chairman.

The CHAIRMAN. Thank you very much.

I have completed my questions. Senator Dodd, why do you not take your questioning period, and then we will come back and see if Senator Pell has anything further.

Senator DODD. Thank you, Mr. Chairman.

I am very intrigued with this, Mr. Bartell. I think the chairman has been very polite to you in calling this colorful rhetoric. I think it is a lot more than that.

The white paper which you have published is 23 pages and it analyzes the Genocide Treaty. The Genocide Treaty is about two pages. Why did you not print the Treaty in the white paper?

Mr. BARTELL. Excuse me. It is on pages 25, 26, and 27.

Ms. KATSON. It is in the back of the white paper.

Senator DODD. It wasn't included in what we have here.

Mr. BARTELL. Excuse me. These were delivered to staff, and it was in the record, Senator.

Ms. KATSON. Senator, I am not sure what you have.

Mr. BARTELL. Senator Percy included it in the record.

Senator DODD. Did you send that out as well included in your white paper?

Ms. KATSON. The white paper was delivered to the committee a couple of days ago with the testimony to be inserted. I am not sure what you are referring to. I am not sure what you have in your hand.

Senator DODD. Well, let me refer to page 5, for instance, of the white paper. I would ask you to open that up and look at it with me. Looking now at the paragraph, "Political Mass Murder Accepted," let me just read it here. It says,

> Surprisingly, the definition of the term genocide in the Genocide Convention is substantially different than both the popular understanding and dictionary definitions. In addition to certain sorts of killing, the Genocide Convention sets forth such things as mental harm, moving children from one place to another, and even birth control. All these and less are genocide.

Now, I presume you are talking about article 2 of the Convention. Am I correct? Isn't that where some of those items are mentioned?

Mr. BARTELL. Yes.

Senator DODD. Now, if you read article 2, having just read from your white paper, the opening paragraph of article 2 in the present Convention,

> Genocide means any of the following acts committed with the intent to destroy in whole or in part a national, ethnical, racial, or religious group as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group.

The way you read the white paper, it sounds as though if you take your children to Disneyland, you could in effect at least be charged with genocide, whereas it talks about with intent to destroy in whole or in part that group, and you don't even mention the word forcibly in your own paper. It just seems like misinformation rather than honestly giving your readers a more exact and thorough examination of the provisions of the treaty. You don't mean that at all. Surely you understand what all that means.

Mr. BARTELL. If we intended to obfuscate or deny the meaning of the Genocide Treaty itself, Senator, why in the world would we include it?

Senator DODD. Well, why do you say this on page 5, that about moving children?

Mr. BARTELL. Because that is precisely what it says in article 2.

Senator DODD. But with the intent to destroy. That is a big difference, the "with intent to destroy" provision.

Mr. BARTELL. Well, you are arguing with the manner in which we phrased it.

Senator DODD. I think it is a lot more than colorful language that you have employed. Let me say to the members of the ABA that I don't know whether you were here earlier this morning when I raised the question of whether or not we would be in a better position with the Genocide Treaty to protect American citizens. One of the complaints of those who oppose it is that we may be subjecting American citizens to charges and prosecution without any sort of protection.

As I understand it, the Genocide Convention is international law. Is that correct?

Ambassador MOORE. I think, Mr. Chairman, that we could say at least that the principles underlying the general convention are customary international law today. I think that is generally conceded.

Senator DODD. In effect, then, it would be possible for an American citizen charged with genocide to be prosecuted and convicted in a nation that has ratified the Genocide Convention, whether or not we ratify it. Is that correct?

Ambassador **Moore**. As a matter of customary international law, it wouldn't make any difference whether they had ratified in that particular case. But I would agree with the thrust of your point, which is that there are guarantees here that, if anything, we are in favor of protecting Americans and preventing disinformation campaigns. There is no doubt that disinformation campaigns are going to be waged against us. They have in the past. They are going to be in the future. The question is, Is this something that is somehow going to harm that, or is it something that is going to try to curtail the possibility of that?

In two respects, it seems to me it curtails that, if we ratify this. One is, we would have a very specific definition of intent that is an extremely narrowly drawn, and properly so, definition of this particularly heinous crime. It is very narrowly drawn in the tradition of criminal law in general, and because of that it seems to me that that works to prevent exaggerated charges of genocide, relying generally on customary international law or erroneous arguments as to what it is.

Second, it seems to me that arguments that can be made by negative implication from the United States not being a party to this, however, much we believe they are utterly unreasonable and go completely counter to all of the fundamental values of our Nation and of Western nations, indeed, the community of mankind, negative implications will be drawn by some that will be an aid to disinformation campaigns, and it seems to me we strengthen our ability to rebut those by——

Senator **Dodd**. I agree with you, but I am more curious about the legal ramifications. Judge Buergenthal.

Judge **Buergenthal**. Senator, I think the answer to your question is that if the United States is a party to the Genocide Convention and if an American citizen, for example, is tried in a foreign country and we are dissatisfied with, that country's application of genocide law in the trial, we then have the right under the convention to take the matter to the International Court of Justice. We do not have that right if we are not party to the convention.

Senator **Dodd**. That is the key point I was trying to raise, and I presume we would also have an argument at least because of our ratification creating parallel jurisdiction, we would be able to make a case for actually trying that citizen in our own country as a signatory to the Genocide Convention. Is that correct as well?

Judge **Buergenthal**. That is correct. Exactly.

Senator **Dodd**. And under the present situation would we have that right to do that, or is it at least a cloudy area?

Judge **Buergenthal**. At present, since we are not a party to the Genocide Convention, we would be blocked in the International Court by the Connally Reservation. That is to say, we could only file the case under article 36(2) of the statute of the International Court, and in that situation the other party could invoke the Connally Reservation against us. It could not do that if we came in under the Genocide Convention, because the Connally Reservation does not apply to article 36(1), and this would be the provision under which a case involving the Genocide Convention would be brought.

The **Chairman**. Senator Dodd, I wonder if before I leave, Mr. Bitker could comment. I do have to leave shortly, and I would appreciat. Mr. Bitker commenting. He has worked on this issue for many years. He comes from Milwaukee, Wis. We certainly welcome you. We would be happy to hear any comments that you would like to make and feel appropriate to make at this time.

STATEMENT OF BRUNO BITKER, PAST CHAIRMAN OF ABA COMMITTEES, MILWAUKEE, WIS.

Mr. BITKER. Mr. Chairman, having heard the discussion this morning as well as a number of previous occasions when I testified and attended these hearings—incidentally, I have followed the genocide matter now since 1948, so my gray and white hairs entitle me, I suppose, to at least a record of longevity on supporting this Convention.

The CHAIRMAN. I have an increasing respect for seniority, let me say.

[General laughter.]

Senator DODD. And I am sure that I will too, in time.

[General laughter.]

Mr. BITKER. Mr. Chairman, I would like to suggest this. It is clear to me, as it has been in the past, that this committee is going to report out this treaty favorably. I think there is nothing to be gained any more by arguing on the merits. It is obvious that this committee has recognized and has studied and has appraised these objections, and has come out with the result of supporting the treaty.

I think all of the time and the energy of this committee should be expended in getting it onto the Senate floor for a vote. Now, I recognize that you may be faced with a filibuster on the floor of the Senate. Recognizing that in advance, I think the members of this committee should work toward the imposition of cloture, No. 1, and second, to securing ratification of the treaty on the Senate floor. Just take it for granted that the majority of the Members of the Senate will support the treaty just like members of this committee support this treaty.

I think that this would produce a practical result. I think the less time that is devoted to arguing these questions which have been raised, as interesting as they are, and that have been raised and discussed at great length in the past, are now immaterial.

The CHAIRMAN. Excuse me. I have an emergency call, and I have to slip out for a minute, but I will be right back.

Mr. BITKER. Should I go ahead and continue with what I have to say?

Senator DODD [presiding]. Please go ahead. I will be acting chairman. And let me say, what else would you like to do today? This is a rare opportunity for me.

[General laughter.]

Mr. BITKER. Mr. Chairman, I think I have made my point actually. I don't want to get into discussions of questions of merits that are raised here. This committee is aware of them and obviously favors the treaty. So let's get now to the job of getting it by the Senate floor. I think all of the time and energy of the members of this committee should be devoted to getting it onto the Senate floor for a vote and to getting a two-thirds vote for ratification on the Senate floor.

Senator DODD. Let me say that we are very privileged today to have Judge Buergenthal here. He is not only a legal scholar, but personally has been a victim of genocide. Judge Buergenthal, if you have any general comments that you would like to make at this time, the committee certainly would like to hear them, and Mr. Bitker, thank you very much for your comments.

STATEMENT OF DEAN THOMAS BUERGENTHAL, AMERICAN UNIVERSITY LAW SCHOOL, WASHINGTON, D.C.

Judge Buergenthal. Thank you, Mr. Chairman. It is very kind of you to refer to my background. As a naturalized U.S. citizen and as an international lawyer and as a survivor of the Auschwitz concentration camp, I am profoundly moved and honored to have this opportunity to appear before your committee as the representative of the American Bar Association to urge U.S. ratification of a treaty that symbolizes mankind's revulsion against and rejection of the ideology that made the Holocaust possible, and in which I lost all but one member of my immediate family.

I was struck by the fact, Mr. Chairman, that there aren't very many countries in the world where a person with my background would be accorded the privilege to represent the organized bar before a legislative body on an issue of such importance or, for that matter, on any issue. It is therefore a source of considerable sadness for me that this great country of ours, which is committed to and lives by the very ideals that provide the strongest bulwark against genocide should, 36 years after World War II, still not have ratified the Genocide Convention.

Today, even without the Genocide Convention, as you pointed out, Mr. Chairman, international law outlaws genocide. That conclusion is no longer in doubt. The convention thus merely codifies what international law already prohibits. Although the United States would therefore not be assuming any additional substantive legal obligations it does not already have, U.S. ratification of the Genocide Convention would be an act of great symbolic importance, because it would associate the United States with the international community's unequivocal rejection of genocide and of the totalitarian ideologies, whether of the right or of the left, that produce genocide.

In my opinion, the United States cannot hope to play a leading role in opposing totalitarianism and is promoting individual liberties in the world while refusing at the same time to associate itself with those international instruments in which the international community proclaims its allegiance to the very principles the United States advocates.

The fact that many of the 90 governments that have ratified the Genocide Convention are among the most brutal violators of human rights does not justify our failure to ratify this treaty. Totalitarian regimes sign human rights treaties because that makes for good propaganda, and it is good propaganda precisely because it capitalizes on the university of mankind's yearning for human rights, which is the strongest enemy of totalitarianism.

The United States has to associate itself not only in fact but also symbolically with this yearning. The world's greatest democracy needs to identify itself with mankind's aspirations to hold all governments to a code of conduct that outlaws genocide. Those who fight for democracy and human dignity, whether it be in the Soviet Union, in Poland, in Cambodia, in Afghanistan, or elsewhere, need to know, in order to carry on their struggle, which is also our struggle, that they are not alone, that their struggle is not hopeless, and that at least some governments which ratify human rights treaties are committed to the principles these treaties proclaim.

Mr. Chairman, I happen to believe that our strongest foreign policy asset is this country's commitment to individual freedom and to democracy. When we in our foreign dealings are true to these ideals, we promote our own foreign policy interests to the utmost, and in this way we put communism on the defensive. Nothing, in my opinion, exposes the evil and the weakness of the Communist system more effectively than acts by the United States which demonstrate that this country shares mankind's aspirations for freedom and human dignity which communism so brutally suppresses.

U.S. ratification of the Genocide Convention, by proclaiming this country's solemn commitment to the eradication of genocide, would be just such a demonstration.

In common with the membership of the ABA, I would be totally opposed to U.S. ratification of any treaty that would violate our Constitution. If I thought that the Genocide Convention, in the form in which it is presented for ratification, raised serious constitutional law issues, I would oppose ratification, and so, quite obviously, would the ABA, but this is not the case.

Whether or not the United States should ratify the Convention is a policy decision and not a question of constitutional law. It is a decision that can and should therefore be made by asking whether ratification would advance U.S. foreign policy interests. I believe that the answer to this question is plainly yes, and that is why I hope very much that your committee, Mr. Chairman, and the Senate as a whole will opt for ratification. The Convention symbolizes mankind's aspirations for a better world. The American people in my opinion cannot but benefit from identifying themselves with a worldwide movement that is sustained by these aspirations.

These aspirations are our strongest weapon in the struggle against Communist expansionism and against totalitarian oppression.

Thank you, Mr. Chairman.

[Judge Buergenthal's prepared statement follows:]

PREPARED STATEMENT OF JUDGE THOMAS BUERGENTHAL

Mr. Chairman: My name is Thomas Buergenthal. I am the Chairman of the Human Rights Committee of the International Law Section of the American Bar Association. I am also the Dean of The American University Law School and the only American judge on the Inter-American Court of Human Rights.

Mr. Chairman, it is a great honor for me to appear before your Committee as the representative of the ABA and to support United States ratification of the Genocide Convention. As an international lawyer, as a naturalized U.S. citizen, and as a survivor of the Auschwitz concentration camp, I am profoundly moved to have this opportunity to represent the ABA in urging U.S. ratification of a treaty that symbolizes mankind's revulsion against and rejection of the ideology that made the Holocaust possible and in which I lost all but one member of my immediate family. There are not many countries in the world where a person with my background would be accorded the privilege to represent the organized bar before a legislative body on an issue of such importance or, for that matter, on any issue. It is, therefore, a source of considerable sadness for me that this great country of ours, which is committed to and lives by the very ideals that provide the strongest bulwark against genocide should, 36 years after World War II, still not have ratified the Genocide Convention.

Today, even without the Genocide Convention, international law outlaws genocide—that conclusion is no longer open to doubt. The Convention thus merely codifies what general international law prohibits.

Although the United States would therefore not be assuming any additional substantial legal obligations it does not already have, U.S. ratification of the Genocide Convention would be an act of great symbolic importance because it would associate the United States with the international community's unequivocal rejection of genocide and the totalitarian ideologies, whether of the right or of the left, that produce genocide.

The United States cannot hope to play a leading role in opposing totalitarianism and in promoting individual liberties in the world while refusing, at the same time, to associate itself with those international instruments in which the international community proclaims its allegiance to the very principles the United States advocates.

The fact that many of the 90 governments that have ratified the Genocide Convention are among the most brutal violators of human rights does not justify our failure to ratify this treaty. Totalitarian regimes sign human rights treaties because that makes for good propaganda, but it is good propaganda precisely because it capitalizes on the universality of mankind's yearning for human rights, which is the strongest enemy of totalitarianism. The United States has to associate itself not only in fact but also symbolically with this yearning. The world's greatest democracy needs to identify itself with mankind's aspirations to hold all governments to a code of conduct that outlaws genocide. Those who fight for democracy and human dignity, whether it be in the Soviet Union, in Poland, in Cambodia, in Afghanistan, need to know, in order to carry on their struggle, that they are not alone, that their struggle is not hopeless, and that at least some governments which ratify human rights treaties are committed to the principles these treaties proclaim.

Mr. Chairman, I happen to believe that our strongest foreign policy asset is this country's commitment to individual freedom and democracy. When we, in our foreign dealings, are true to these ideals, we promote our own foreign policy interests to the utmost, putting world Communism on the defensive. Nothing exposes the evil and the weakness of the Communist system more effectively than acts by the United States which demonstrate that this country shares mankind's aspirations for freedom and human dignity which Communism so brutally suppresses. U.S. ratification of the Genocide Convention, by proclaiming this country's solemn commitment to the eradication of genocide, would be just such a demonstration.

In common with the membership of the ABA, I am totally opposed to U.S. ratification of any treaty that would violate our Constitution. If I thought that the Genocide Convention, in the form in which it is presented for ratification, raised serious constitutional law issues, I would oppose its ratification and so, quite obviously, would the ABA. But this is not the case. Whether or not the United States should ratify the Convention is a policy decision that presents no constitutional law obstacles. It is a decision that can and should therefore be made by asking whether ratification would advance U.S. foreign policy interests. I believe that the answer to this question is yes, and that is why I hope very much that your Committee, Mr. Chairman, and the Senate as a whole will opt for ratification of the Convention. It symbolizes mankind's aspirations for a better world. The American people cannot but benefit from identifying themselves with a world-wide movement that is sustained by these aspirations. These aspirations are our strongest weapon in the struggle against Communist expansionism and totalitarian oppression.

The CHAIRMAN [presiding]. Thank you very much, Dean Buergenthal.

Professor Moore, you have submitted an extraordinarily good statement. Your entire statement will be incorporated into the record. Is there anything further that you would like to add now?

Ambassador MOORE. Yes, Mr. Chairman, I would like to add a word.

The CHAIRMAN. Mr. Bartell?

Mr. BARTELL. Mr. Chairman, I do have an appointment and must leave.

The CHAIRMAN. Thank you very much. You are excused. We thank you both very much for being here.

Ms. KATSON. I would like to say that even though the deck was kind of stacked against us today, because we have only been questioned by Senators who are in favor of the treaty, it was my pleasure to have the opportunity to appear before this committee.

The CHAIRMAN. We very much appreciate your being here. We will carry on the debate, we hope, at the level that you have maintained today.

Mr. BARTELL. Thank you.

The CHAIRMAN. Thank you.

Professor Moore?

STATEMENT OF PROF. JOHN NORTON MOORE, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, CHARLOTTESVILLE, VA.

Ambassador MOORE. Thank you, Mr. Chairman.

In addition to placing into the record my own statement, I would like to also place in the record the complete statements of my two colleagues and the report of the American Bar Association Committee and the House of Delegates resolution on this, and then perhaps just take 2 minutes to add one word about the American Bar Association's support.

That word, Mr. Chairman, is that the American Bar Association is foursquare behind, and views this as an important effort, your historic initiative in beginning this process of United States ratification of the convention to prevent the crime of genocide.

Mr. Chairman, I would like also to indicate that Mr. David R. Brinks, the president of the American Bar Association, was sorry that he could not come and personally testify on this issue today. He believes that this is one of the important top legislative priorities of the American Bar Association, and that in terms of the legislative agenda, this is one of the most important measures to be supported in which the American Bar Association will do everything that it can to see a favorable outcome.

Finally, Mr. Chairman, let me just make two points about the role of the American Bar Association on this occasion. The first is that the American Bar Association is really the most authoritative organ of the organized bar. It is therefore appropriate and, it seems to me, particularly important that the American Bar Association has overwhelmingly determined, and this is not a close vote, that there is no legal impediment whatsoever to the U.S. accession to the Genocide Convention, whether we are talking scope of the treaty power, specific provisions of the Constitution, or any other issue, federalism, sovereignty, or any other legal question.

In short, there is simply no legal impediment.

Second, members of the legal profession and the bar have a public responsibility to promote the development of law and the attainment of justice. Few issues that we can look at in this regard could be more important than strengthening the normative basis against the kind of abhorrent mass murder, mass terrorism with which we are dealing in this convention.

Mr. Chairman, that concludes any remarks that I would have. I think that my colleague, Mr. Bitker, may not have had an opportunity to complete all of his remarks, so I would simply, with your indulgence, see if he would like to add anything to this.

If you would like, we have been listening to the arguments against. We have had an opportunity to respond to only one or two of those. Only if you like and have time, we have responses to some seven or eight others that we have heard this morning.

[Messrs. Moore's, Buergenthal's, and Bitker's prepared statements follow:]

PREPARED STATEMENT OF JOHN NORTON MOORE, VICE-CHAIRMAN, DIVISION OF PUBLIC INTERNATIONAL LAW, SECTION OF INTERATIONAL LAW; THOMAS BUERGENTHAL, CHAIRMAN, COMMITTEE ON INTERNATIONAL HUMAN RIGHTS, SECTION OF INTERNATIONAL LAW; AND BRUNO BITKER, MEMBER, STANDING COMMITTEE ON WORLD ORDER UNDER LAW, AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Committee: My name is John Norton Moore, and I am honored to accept your invitation, on behalf of the American Bar Association President, to express the support of the 285,000-member ABA for immediate Senate advice and consent to ratification of the Convention on the Prevention and Punishment of the Crime of Genocide.

I appear today as the Divisional Vice-Chairman for Public International Law of the ABA's Section of International Law. I am the Walter Brown Professor of Law at the University of Virginia and direct that university's Center for Law and National Security. Accompanying me are two distinguished international law scholars and recognized experts on the Genocide Convention.

The Honorable Thomas Buergenthal is Dean of the Washington College of Law of the American University, is a Judge on the Inter-American Court of Human Rights and serves as Chairman of the International Law Section's Committee on International Human Rights.

Mr. Bruno Bitker is a lawyer in Milwaukee, Wisconsin and is a member, and past chairman, of the Association's Standing Committee on World Order Under Law. Mr. Bitker is a leader, both within and without the Association, in the 32-year effort to ratify the Genocide Convention, and testified to that effect for the ABA before this Committee in 1977.

INTEREST OF THE AMERICAN BAR ASSOCIATION

Mr. Chairman, the ABA has concerned itself with this treaty for nearly as long as the Convention has been before the Senate. Some three months after the Convention was transmitted by President Truman to the Senate on June 16, 1949, for its advice and consent, the Association's House of Delegates resolved to oppose ratification of the treaty "as submitted" by the President. For over 20 years thereafter, various Association entities continued to study the constitutional issues raised by the Convention; a resolution in support of ratification was defeated in February 1970 by a 130-126 vote of our House of Delegates.

Subsequently, various ABA groups reviewed the understandings and declaration which were the basis for this Committee's approval of the Convention by voice vote early in 1973. These three understandings and a declaration fully resolved the constitutional concerns of the ABA. Consequently, in February 1976, the Association's House of Delegates by voice vote approved a resolution favoring ratification with the understandings and declaration recommended by this Committee.

Ratification of the Genocide Convention is now one of the legislative priorities of the ABA President, and as such is one of a handful of legislative goals of the highest importance to the Association. As Mr. Bitker told this Committee in 1977, "[C]ertainly nothing is more basic to the obligation the United States assumed when it ratified the U.N. Charter, than to outlaw mass murder of a national, ethnical, racial or religious group, as such, whether committed in time of peace or war . . . [United States'] failure to ratify borders on constituting a national disgrace." We urge this Committee, the Senate and our

Government to end this period of national disgrace by promptly ratifying this Convention.

As lawyers, we think the legal profession has a unique role to play in this ratification process. In a May 1977 address to the 20th anniversary meeting of the Inter-American Bar Foundation, then-ABA President William B. Spann observed that the Association's Code of Professional Responsibility "makes it quite clear that a lawyer should not regard himself simply as a functionary of the legal system, but as one who must defend and develop it."[1] There is no more basic human right for which the legal system was established to defend, than the right of a human to live.

There are countries throughout the world whose governmental recognition of this right could be questioned. Mass slaughter of hundreds of thousands of citizens from identifiable ethnic or religious groups has repulsed the world in recent years. These events are evidence that genocide is a crime against mankind and one threatening the peace and security of the world, that it can only be prevented and punished through enforcement of recognized international law, that the United States should be the leading force in the world officially to condemn this crime. To state our opposition to genocide, but to refrain from actively seeking to prevent it, is merely to sanction its perpetuation.

In February 1976 the ABA's policy-making House of Delegates adopted the following resolution by voice vote:

Be It Resolved, That the American Bar Association favors the accession of the United States to the United Nations Convention on the Prevention and Punishment of the Crime of Genocide with the following Understandings and Declaration which have been approved by the Senate Committee on Foreign Relations:[2]

1. That the U.S. Government understands and construes the words "intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such" appearing in article II to mean the intent to destroy a national, ethnical, racial or religious group by the acts specified in article II in such a manner as to affect a substantial part of the group concerned.

2. That the U.S. Government understands and construes the words "mental harm" appearing in article II(b) of this Convention to mean permanent impairment of mental faculties.

3. That the U.S. Government understands and construes article VI of the Convention in accordance with the agreed language of the Report of the Legal Committee of the United Nations General Assembly that nothing in Article VI shall affect the right of any state to bring to trial before its own tribunals of any of its nationals for acts committed outside the state.

4. That the U.S. Government declares that it will not deposit its instrument of ratification until after the implementing legislation referred to in article V has been enacted.

Be It Further Resolved, That the President of the American Bar Association or his designee is hereby authorized to present the views of the Association as herein expressed before the appropriate committees of the Congress and other agencies of the Government of the United States.

The American Bar Association, through adoption of this policy, agrees with the Departments of State and Justice that the Convention, along with the recommended understandings and declaration, pose no constitutional obstacles to ratification. Were this not the case, the first stated purpose of the ABA—". . . to uphold and defend the Constitution of the United States . . ."—would prohibit us from supporting ratification, much less supporting it as strongly as we do.

WHAT THE CONVENTION PROVIDES—OBLIGATIONS OF THE UNITED STATES

The Genocide Convention has established within the body of international law the intentional crime of mass destruction of people—of the whole or a substantial part of a national, ethnical, racial or religious group. Applicable in peacetime and during war, genocidal acts include intentional killing, causing of serious bodily or mental harm (understood by the United States to mean "permanent impairment of mental faculties"), inflicting living conditions so adverse as to intend to cause the group's destruction, imposing measures intended to prevent births within the group—thus destroying the group, and forcibly transferring children of the group to another group. Punishable acts include the actual commission of genocide, as well as conspiracy in, or direct and public incitement of, or attempt to commit, genocide, or complicity in committing genocide.

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[1] William B. Spann, "Lawyers and the Promotion of Human Rights in America". The Legal Protection of Human Rights in the Western Hemisphere, 22, Inter-American Bar Foundation (March 1978).

[2] International Convention on the Prevention and Punishment of the Crime of Genocide, Report on Executive O, 81st Congress, 1st Session (Ex. Report No. 93-5; March 6, 1973).

Persons charged wth any of these offenses, whether public officials or private citizens, shall be tried in the state where the offense was alleged to have occurred or before an international tribunal. No such international tribunal or competent jurisdiction exists; if one were established, the United States Congress would have to approve submitting to the new court's jurisdiction. One of the understandings approved by the Foreign Relations Committee, and endorsed by the ABA, would make clear that U.S. citizens could be tried in U.S. courts for genocidal acts committed abroad. Furthermore, while the Convention provides that contracting parties shall grant extradition requests "in accordance with their laws and treaties in force" (Article VII), the Convention itself is not an extradition treaty. Since no current extradition treaties to which the United States is a party cover the crime of genocide, the United States would not be obligated to extradite U.S. citizens to a foreign country. Any future extradition treaty which might include the crime of genocide would, of course, be subject to the advise and consent power of the Senate. Each country would establish its own penalties to be imposed for convictions of the enumerated crimes.

A contracting party to the Convention may request appropriate U.N. entities to take action to assist in preventing or suppressing genocide (Article VIII). Also, the contracting parties will submit to the International Court of Justice disputes concerning the "interpretation, application or fulfillment" of the terms of the Convention (Article IX). This provision does not fall under the Connally amendment, by which the United States determines which cases are within the domestic jurisdiction of the United States, and thus outside the court's jurisdiction. However, provisions comparable to Article IX for resolution of disputes by the International Court of Justice are included in such treaties as the Japanese Peace Treaty and the Antarctic Treaty, to which the United States is a party.

Finally, the United States has declared that it will not deposit its instrument of ratification following Senate approval until after enactment by Congress of implementing legislation.[3] Thus, the Genocide Convention is not a self-executing treaty, but rather one requiring the usual legislative approval of both Houses of Congress and the President.

Over the lengthy period of congressional debate over the meaning and possible adverse effects of the Convention's provisions, a number of recurring questions have been raised. For the benefit of the Committee, we attach to this statement nine of the most frequently asked questions, and our responses. To summarize the attached responses, the ABA simply finds no responsible support for various constitutional questions raised against the Convention. To suggest that the protection against mass murder of a selected people is an improper subject of international concern, and thus without this nation's treaty power, is nonsense. Similarly, other legal issues concerning, for instance, the effect of voluntary birth control, the acts of soldiers in wartime and the "incitement" language of Article III all have long been resolved in the context of U.S. domestic law or international law.

The fact that these legal issues are without merit is perhaps best substantiated by the testimony before this Committee in 1970 by then-Assistant Attorney General William H. Rehnquist:

"In 1950 some of the questions concerning Federal jurisdiction and the treaty power were considered somewhat novel. However, developments in the intervening years—the extensive use of the treaty power and the growth of Federal criminal jurisdiction—have, it seems, illuminated both these areas to the point where I believe I can safely say that the questions before the Committee and the Senate are more matters of policy than questions of legal power. Other witnesses in support of this treaty have, I believe, made this clear."

THE GENOCIDE CONVENTION SHOULD BE RATIFIED NOW

The United States should ratify the Genocide Convention immediately because such an act would be a timely expression of this nation's unalterable commitment to the rule of law in international affairs, because it would strengthen our hand in the current conduct of foreign relations with allies and adversaries alike, and because it would place us in the company of 89 other nations—where we should have been long ago—in expressing our collective national repugnance to mass acts of murder of unspeakable proportions.

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[3] See Ex. Report No. 93–5 for the text of proposed implementing legislation, pages 21–23, 93rd Congress, 1st Session (March 6, 1973).

As a member nation of the United Nations, and as a signatory to the Helsinki Accords, among other agreements, the United States has demonstrated its leadership in seeking to bring more order to the peaceful relations among nations. The essence of this commitment is our devotion to an ordered existence governed by universally accepted rules and procedures—the rule of law. Since our own freedoms are assured through adherence to the rule of law—a concept by no means universally accepted throughout the world—our sovereignty is that much more enhanced through our efforts to expand the primary of the rule of law in our relations with other nations. Ratification of the Genocide Convention furthers this cause.

It is clear to most observers that the Soviet Union and other nations with less regard for the type of freedoms we take for granted pose the most serious threat to our national interests. As Dean Buergenthal recently stated, the threat of the Soviet Union:

"Is not only military or subversive, it is also ideological and it must therefore be confronted on the ideological level as well . . . A sound human rights policy provides the U.S. with an ideology that distinguishes us most clearly from the Soviet Union and seriously undercuts the ideological appeal of Communism."

However, our ideological hand is not strong in dealing with the Soviets when our criticism of their treatment of religious or ethnic groups prompts the question of why the United States has not ratified the Genocide Convention. In the terminology of legal equity, ratification of the Convention would bring us to the international negotiating table with "clean hands."

Finally, it is important to remember that this treaty is hardly a novel idea. It has been in force for some 30 years and is the law in the majority of the world. The United States was a leading participant in drafting the treaty and in advocating its importance. The crime of genocide surely is the most difficult for civilized people to comprehend, and the most shocking to the human conscience. The extent to which most of the rest of the world has signaled its horror of this crime by ratifying the Convention is both a measure of this country's humiliation at not being a signatory, and the strongest reason why ratification should wait no longer.

Mr. Chairman, we thank you for this opportunity to again urge ratification of this Convention, and will be pleased to respond to your questions.

QUESTIONS AND ANSWERS CONCERNING THE GENOCIDE CONVENTION

Question 1. Doesn't the Convention allow the United Nations to investigate United States domestic officials and thus subject our Government to irresponsible charges of genocide in the World Forum?

Answer. Article VIII which empowers a contracting party to call upon the competent organs of the United Nations "to take such action under the Charter . . . as they consider appropriate for the powers of the United Nations. Genocide, involving mass murder on a broad scale, would violate not only the human rights provisions of the UN Charter but would normally involve a threat to the peace and therefore would clearly be within the powers of the UN to discuss. It need also be noted that article 2(7) of the UN Charter contains a proscription against intervention in matters which are essentially within the domestic jurisdiction of any state. . . ."

The argument that ratification of the Convention would subject the United States to irresponsible charges of genocide is without foundation. Ratification would not alter the present situation to our disadvantage. Spurious propaganda charges alleging genocide can be made by our enemies whether or not the United States is a party to the Convention. If anything, ratification would improve our position to rebut spurious charges by subjecting our behavior to a precise legal definition of genocide. Further, our failure to ratify in fact weakens the effectiveness of our replies.

Question 2. Isn't it true that the Genocide Convention would allow United States POW's to be charged with genocide by enemy nations?

Answer. An inference such as this overlooks the simple reality that such a charge may be made by the authorities of a state involved in a conflict with the United States with or without the Genocide Convention. There is nothing in the Genocide Convention that would provide warrant for charges by an enemy nation that our POW's are guilty of genocide. The existence of the Genocide Convention, and more importantly the ratification or rejection of the Convention by the United States, would have little effect on the treatment of American POW's. This was clear in the cases of American POW's held by North Vietnam (where neither state was party to the Convention). Their peril will not be increased by approval of the Convention while peril may be avoided for tens of millions by ratification of the Convention.

Question 3. Wouldn't the Convention change the constitutional structure of the United States in that the United States lacks the constitutional power to make treaties in the human rights field because treatment by a state of its own nationals is a domestic matter and not properly the subject of an international agreement?

Answer. In the past, the power of the United States under the Constitution to make treaties in the human rights field has been questioned on the grounds that the treatment by a state of its nationals is a matter of domestic jurisdiction. This was one of the points raised in opposition to the Genocide Convention by the American Bar Association. However, the special Committee of Lawyers of the President's Commission for the Observance of Human Rights Year 1968 concluded after a survey of the constitutional issues involved and of the past treaty making practice of the United States that, "Treaties which deal with the rights of individuals within their own countries as a matter of international concern may be a proper exercise of the treaty-making power of the United States . . ."

The Supreme Court declared in *Geofroy* v. *Riggs*, 133 U.S. 258, 267 (1890), that the treaty-making power may be exercised on any matter "which is properly the subject of negotiation with a foreign country". The United States is a party to numerous international agreements relating to the activities of its own citizens within the United States because those treaties deal with matters appropriate for international negotiation. Examples include treaties on narcotics, public health and nature conservation, and the Supplementary Convention on Slavery.

In the words of the Special Committee of Lawyers, of which retired Supreme Court Justice Tom C. Clark was chairman: "It may seem almost anachronistic that this question continues to be raised." This concern needs to be determined objectively in the light of the current interests of the United States in an interdependent world and contemporary concepts of international law—not on the basis of notions that may have been appropriate in a different historical time. In today's world the massive destruction of a racial, religious or national group in one country has an immediate impact on members of this group in other countries, stimulates demand for intervention and adversely affects international relations. As said by the Senate Foreign Relations Committee: "on both moral and practical grounds, the Commission of genocide, involving as it must mass action, cannot help but be of concern to the community of nations".

Question 4. Isn't it true that the Genocide Convention would alter the balance of authority between the State and Federal government?

Answer. The Constitution, Article I, Section 8, specifically gives Congress the power to "define and punish . . . offenses against the law of Nations". The act of genocide is almost universally recognized in treaties, international custom, and the acts of international organizations as an offense against the law of nations. It is thus clearly within the power of Congress to outlaw the crime of genocide. Ratification of the Genocide convention will add no powers to those the Federal Government already possesses.

Question 5. Wouldn't birth control offered on a voluntary basis be subject to attack as genocide?

Answer. This fear has no foundation. None of the five acts in the Convention definition is genocide unless "committed with intent to destroy in whole or in part" one of the named group as such. Thus, basic to any charge of genocide is the element of intent. To avoid any misconceptions the United States ratification would be accompanied by an understanding that the intent required by the Convention be the intent to destroy one of the named groups "in such a manner as to affect a substantial part of the group concerned".

Question 6. Couldn't the Convention result in the bringing of United States citizens to arrest and trial in foreign areas on charges of genocide?

Answer. The Convention does impose an obligation on the State in whose territory acts of genocide had been committed to try all persons charged with committing genocide within that State. However, it is clear from the Convention's negotiating history that the Convention does not bar another State from trying before its own tribunals its nationals who had committed such acts outside the State. This theory of concurrent jurisdiction—jurisdiction based on the site of the alleged offense and jurisdiction based on the nationality of the offender—has been thoroughly explored. The United States government, however, made it clear to the other contracting parties that it intends to construe the Convention so as to permit it to try its own nationals for punishable genocidal acts whether committed at home or abroad. This is recorded in the United States understanding that the United States Government "understands and construes Article VI . . . that nothing in Article VI shall affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State".

Question 7. Doesn't the Convention open the possibility that United States citizens can be extradited and subject to trial for genocide before a foreign tribunal without constitutional protection and benefits?

Answer. Ratification of the Convention would merely permit the adding on of one or more crimes—genocide—to the many crimes for which American citizens may already be extradited under existing extradition treaties. The Convention is not itself an extradition treaty. Neither United States law nor any of the U.S. extradition treaties at present cover genocide. Under the Convention extradition would take place only in accordance with laws and treaties in force. In any case, the United States does not grant extraction unless a prima facie case is established against the accused and unless the accused will be afforded by the requesting state the due process required by our Constitution. Such a treaty could be negotiated in the future with or without the Genocide Convention but it would need to be brought before the Senate for approval.

Question 8. Isn't it true that ratification of the Convention would subject United States citizens to trial before international penal tribunals?

Answer. No. It is unfortunate draftsmanship that Article VI of the Convention provides persons charged with genocide shall be tried "by such international tribunal as may have jurisdiction . . ." No such international tribunal presently exists and there is no negotiation to create one. If any such tribunal were established it would not have jurisdiction over United States nationals unless the United States agreed to such jurisdiction either in the form of the Senate's advise and consent to ratification of a treaty or by statute expressing its consent.

Question 9. Doesn't the provision in the Convention for settlement of disputes by the International Court of Justice unreasonably limit United States sovereignty?

Answer. The provision in the Convention is not a new one in the United States practice. The United States has become a party to many international agreements providing for reference to the International Court of Justice of disputes arising under such agreements, including the Japanese Peace Treaty, the Antarctic Treaty and the Statute of the International Atomic Energy Agency. This provision for the settlement of disputes over the interpretation of the Genocide Convention does not unreasonably limit our sovereignty.

A number of countries, notably the communist countries, have entered reservations to their ratifications stating that they do not accept compulsory reference to the International Court of Justice. The United States is thus placed in a position to invoke those countries reservations in its own behalf to defeat the court's jurisdiction in cases brought under the Convention by countries which have made such a reservation. Our interests are better served by having any charges of genocide against us considered in a less politically motivated forum like the International Court of Justice.

STATEMENT OF BRUNO V. BITKER, CHAIRMAN, COMMITTEE ON INTERNATIONAL HUMAN RIGHTS, SECTION ON INTERNATIONAL LAW, AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Committee: My name is Bruno Bitker and I am chairman of the American Association's Committee on International Human Rights of the Section on International Law. I am honored to appear before you today on behalf of the American Bar Association to urge the Senate to give its advice and consent to ratification of the Genocide Convention. I have appeared before this Committee at prior hearings, conveying the support of a variety of organizations. I am, however, especially delighted to do so this time on behalf of the ABA, which represents the organized bar of this country. The American Bar Association, as this Committee is aware, did not easily or quickly arrive at its endorsement of the Genocide Convention.

In fact, in 1949, prior to the hearings conducted by this Committee, it had decided not to support ratification because the treaty "involves important constitutional questions . . ." not satisfactorily resolved. Subsequently, in 1970, following President Nixon's request to the Senate to act on the Genocide Convention, the ABA again considered the question. But by a divided vote of 130 to 126 in the House of Delegates, it declined to change its earlier stand. Opponents of ratification had frequently cited the ABA position as justifying U.S. inaction. However, upon further study and consideration, in February 1976, the ABA reversed its position and by an overwhelming vote recommended the ratification of the Convention. A copy of that recommendation and the supporting report is filed with this statement.

Though considerable attention was given to this Convention by the bar association before it decided to support it, it does not match the extensive and thorough analysis of every provision accorded to it by this Committee since President Truman, on June 16, 1949, sought the advice and consent of the Senate to ratification. The published hearings of the subcommittee held in January and February, 1950, contain about everything that could be said on the subject, pro and con. The opposition feared that it might undermine our constitutional structure. On the other hand, the favorable testimony was so meaty, it would be difficult to single out specific references. However, if any Senator or staff member wishes to read the supporting testimony of just one witness, I would suggest the remarkable presentation by Philip B. Perlman, Solicitor General of the United States (p. 22, et seq.).

On May 23, 1950, the subcommittee reported out the Convention favorably with one declaration and four understandings (summarized in "Legislative History of the Committee on Foreign Relations," S. Doc. No. 247, 81st Cong., 2d Sess. at p. 27, 1950). The full committee, however, withheld action and for almost two decades it remained in the Senate's deep freeze. Today it is eligible for a place in the "Guiness Book of World Records" as being the o dest treaty pending before the Senate (U.S. Senate, Legislative Calendar, 95th Congress, March 31, 1977).

Although the Senate had taken no further action following the 1950 hearings, in July, 1963, President Kennedy sent to the Senate three human rights treaties (Political Rights of Women, Abolition of Forced Labor, and a Supplementary Slavery Convention). In the course of the hearings on these conventions in 1967, action on the Genocide Convention was urged. However, no action was taken on it.

In 1968, the year designated by the United Nations as Human Rights Year in honor of the 20th anniversary of the adoption of the International Declaration of Human Rights, the President created a President's Commission for the Observance of Human Rights Year. The Commission urged ratification of the Convention. More particularly, it created a special committee of lawyers headed by Supreme Court Justice Tom C. Clark (retired), which included some of the most prominent lawyers in the country. That committee, on which I was privileged to serve, issued a report on the treaty-making power of the United States in human rights matters. Justice Clark, in his letter of transmittal, said in part:

> . . . I would like to reiterate here, however, our finding, after a thorough review of judicial, congressional and diplomatic precedents, that human rights are matters of international concern; and that the President, with the United States concurring, may, on behalf of the United States, under the treaty power of the Constitution, ratify or adhere to any international human rights convention that does not contravene a specific Constitutional prohibition.

In its conclusion, the report said:

> . . . It may seem almost anachronistic that this question continues to be raised. It is nearly a quarter of a century since this country used the treaty power to become a party to the U.N. Charter, one of those basic purposes is the promotion of human rights for all. The list of parties to the various human rights treaties proposed by the U.N. has become longer each year. In each of the last two years the U.S. Senate has approved a human rights treaty without a single dissenting vote. In December, 1968, the Chief Justice of the United States noted that we as a nation should have been the first to ratify the Genocide Convention and the Race Discrimination Convention. And yet the suggestion persists that this Nation is constitutionally impotent to do what we and the rest of the world have, in fact, been doing.

The report will be of value to members of this Committee and to the staff that drafts your report, and because it is now out of print, I ask consent to file my copy as a part of the record of these hearings.

Two other reports prepared by entities of the American Bar Association in support of ratification appear in the printed hearings of the subcommittee held March 10, 1971. One, at page 147, is the report of the ABA Section on Individual Rights and Responsibilities and the other, at page 196, is the report of the ABA Standing Committee on World Order Under Law. I participated in the drafting of the several reports to which I have alluded in this statement.

In February, 1970, President Nixon reminded the Senate that the Convention continued to be unfinished business and urged prompt action. Thereafter, new hearings were held in April and May, 1970, and again in March, 1971. The Committee reported out the Convention favorably on December 8, 1970, on May 4, 1971, on March 6, 1973 and again on April 29, 1976.

There is no better or more succinct review of the status of the Convention than as set forth in the Committee's 1976 report. That report includes three understandings and one declaration, which are also included in the ABA's resolution of approval. Attached to the Committee's report is the implementing legislation proposed in accordance with Article V of the Convention. I see no problem concerning this legislation and I understand none has been suggested.

Everything that can be said on the constitutional question has been fully discussed in all these hearings and Committee reports. To save time and to avoid unnecessary repetition, I am not repeating these arguments. It is difficult to take seriously any basic constitutional objection to the Convention. It is conceivable, though it has not been urged, that there are public policy objections to ratification. But it would be hiding behind a false front to fail to ratify on spurious constitutional grounds.

As noted in the Committee's last report, no fewer than 82 members of the United Nations (perhaps 83 depending on how China's accession is viewed) have become parties to the Convention. Although the United States was a leader in drafting and securing its adoption in the United States in 1948, it is the outstanding laggard in ratifying it. Its failure to ratify borders on constituting a national disgrace. As the late Chief Justice Earl Warren said in December, 1968, "We as a nation should have been the first to ratify the Genocide Convention . . . Instead we may well be the last. . . ."

Since the Committee's 1976 report, a new President of the United States has come into office. President Carter has followed all of his predecessors from Truman through Eisenhower, Kennedy, Johnson, Nixon, and Ford in support of America's furthering the cause of international human rights, including ratifying the Genocide Convention. As President Carter stated on March 17th to the United Nations: "Ours is a commitment, and not just a political posture . . . To demonstrate this commitment . . . I will work closely with our own Congress in seeking to support the ratification . . . of the United Nations Genocide Convention."

The legal obligation with respect to human rights is thus noted by Philip C. Jessup, former member of the International Court of Justice:

"It is already law at least for members of the United Nations, that respect for human dignity and fundamental human rights is obligatory. The duty is imposed by the Charter, a treaty to which they are parties."

Certainly nothing is more basic to this obligation which the United States assumed when it ratified the U.N. Charter, than to outlaw mass murder of a national, ethnic, racial, or religious group, as such, whether committed in time of peace or war.

I have especially referred in this statement to the endless hearings through which this Committee has sat to emphasize the need to fish or cut bait. The Committee has certainly exhibited great courtesy as well as extreme patience over the years in allowing anyone and everyone to express his or her views on the subject. As it said in 1976, "further hearings on the treaty were not warranted in view of the voluminous record made in hearings in 1950, 1970 and 1971." There appears no provision in the Convention that would support a successful attack on constitutional grounds. No objections asserted on a legal basis justifies delaying ratification. Any conceivable uncertainty as to a few phrases has been cured by the understandings. If there are justifiable reasons of national policy for not ratifying, they have not been advanced. The one new fact to be noted since the last hearing is the favorable action of the American Bar Association. And that has now been recorded.

Each time the Committee has acted it has reported the Convention favorably. But each time it has reached the Senate floor, an actual or threatened filibuster has prevented the Senate from voting to support a commitment we made on

December 9, 1948, when we approved the treaty in the United Nations. It is already past the time to sign on the dotted line.

The United States is now reestablishing its moral leadership in the world. If it now ratifies this Convention, it would be a clear demonstration that it is faithful to its pledge under the U.N. Charter. It would also be acting in its own best national interest.

[Resolution adopted by House of Delegates, American Bar Association, February 17, 1976, and the Supporting Report]

American Bar Association—Section of International Law

RECOMMENDATION

The Section of International Law recommends adoption of the following resolutions:

Be it resolved, that the American Bar Association favors the accession of the United States to the United Nations Convention on the Prevention and Punishment of the Crime of Genocide with the following Understandings and Declaration which have been approved by the Senate Committee on Foreign Relations:[1]

1. That the U.S. Government understands and construes the words "intent to destroy, in whole or in part, a national ethnical, racial or religious group as such" appearing in article II to mean the intent to destroy a national, ethnical, racial or religious group by the acts specified in article II in such manner as to effect a substantial part of the group concerned.

2. That the U.S. Government understands and construes the words "mental harm" appearing in article II(b) of this Convention to mean permanent impairment of mental faculties.

3. That the U.S. Government understands and construes article VI of the Convention in accordance with the agreed language of the Report of the Legal Committee of the United Nations General Assembly that nothing in Article VI shall affect the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside the state.

4. That the U.S. Government declares that it will not deposit its instrument of ratification until after the implementing legislation referred to in article V has been enacted.

Be it further resolved that the President of the American Bar Association or his designee is hereby authorized to present the views of the Association as herein expressed before the appropriate committees of the Congress and other agencies of the Government of the United States.

REPORT[2]

SUMMARY OF PROVISIONS OF THE CONVENTION

ARTICLE I

Genocide is a crime under international law, whether committed during peace or war.

The contracting parties undertake to prevent and punish such a crime.

ARTICLE II

Acts constituting Genocide are those committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" by:

(a) "Killing members of the group";

(b) "Causing serious bodily or mental harm to members of the group";

(c) "Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part";

(d) "Imposing measures intended to prevent births within the group";

(e) "Forcibly transferring children of the group to another group".

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[1] S. Exec. Report No. 93-5, 93rd Congress, 1st Sess., (1973).

[2] In preparation of this report the Section considered the testimony presented at the Hearings on Genocide before the Subcommittee of the Senate Committee on Foreign Relations in 1950, the Senate Committee's Report of December 8, 1970, May 4, 1971 and March 6, 1973 as well as previous reports of other sections and committees of the American Bar Association and other pertinent material including a Report In Support Of The Treaty Making Power of the United States in Human Rights Matters prepared by the Special Committee of Lawyers of the President's Commission for the Observance of Human Rights Year 1969. (See the Appendix 18, House Foreign Affairs Subcommittee Hearings August–December 1973).

ARTICLE III

Acts which are punishable are:

(a) Genocide,
(b) Conspiracy to commit Genocide,
(c) Direct and public incitement to commit Genocide,
(d) Attempt to commit Genocide,
(e) Complicity in Genocide.

ARTICLE IV

Persons committing Genocide shall be punished, whether constitutionally responsible rulers, public officials or private individuals.

ARTICLE V

The contracting parties shall enact the necessary implementing legislation to enforce provisions of the Convention.

ARTICLE VI

Persons charged with a violation of the Convention are to be tried by a competent tribunal in the state where the act was committed or by an international penal tribunal having jurisdiction of the parties.

ARTICLE VII

For the purposes of extradition Genocide is not to be considered a political crime. Extradition shall be granted by the contracting parties in accordance to their laws and treaties in force.

ARTICLE VIII

Any contracting party may call upon the competent organ of the United Nations for action where appropriate to carry out the purport of the Convention.

ARTICLE IX

Disputes relating to "interpretation, application or fulfillment" of provisions of the Convention including those relating to the responsibility of a state for Genocide or other acts punishable by the Convention shall be submitted to the International Court of Justice at the request of the disputing parties.

Article X to XIX are procedural in nature.

DISCUSSION

The purpose of the Convention is to make Genocide an international crime whether committed during peace or war. It seeks to prevent and punish when it occurs the destruction, in whole or in part, of a national, ethnical, racial or religious group as such. The Convention defines Genocide, specifies the acts which constitute Genocide, sets forth the obligations of the parties, the place of trial of the accused, and provides for submission of disputes relating to interpretation, application or fulfillment to the International Court of Justice.

The first Understanding makes it clear that where the words "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" are used in the definition of the crime of Genocide that it means an intent to destroy by such acts in such a way as to affect a "substantial" part of the group concerned.

The second Understanding states that where the word "mental harm" is used to define a punishable act, it means a "permanent impairment of mental facilities." It does not include violent expressions or prejudice against individual members of groups. It also would discourage any frivolous allegations of mental harm.

The third Understanding is to take care of the situation where a national of the United States committed an act outside of the state. Pursuant to this understanding the U.S. will have the right to bring to trial before its own tribunals any of its nationals for acts committed. There has been considerable discussion regarding the Convention from the viewpoint of extradition. It should be understood that the Convention itself is not an extradition treaty.

The Convention is not self-executing but requires necessary implementing legislation. The recommended Declaration makes it clear that we must enact necessary federal legislation pursuant to our constitutional procedure prior to depositing our instrument of ratification.

Attached hereto as Appendix A is a copy of Senate Executive Report 93-5, 93rd Cong. 1st Sess., (1973). This Report lists the pertinent provisions of the Convention and gives an interpretation of each provision based upon the testimony offered at the earlier hearings. A copy of the Convention will also be made available to any interested party.

CONCLUSION

Eighty-two nations to-date have ratified and/or acceded to the Genocide Convention. The world community has, therefore, defined Genocide as "a crime against the laws of nations". The United States is a party to other treaties that define and establish an international crime. (The Geneva Conventions On Protection Of War Victims, 1949, TIAS 3362-3365; The Conventions For The Regulation of Whaling, 1935, TS 880, 1946, TIAS 1849; the International Convention for the Prevention of the Pollution of the Sea by Oil, 1954, TIAS 4900 and the Single Convention On Narcotic Drugs, 1961, TIAS 6298.) Statement made in the past and raised in the Senate and the ABA House of Delegates are no longer pertinent. The passage of time has confirmed that Genocide is a matter of "international concern" which should be regulated as an international crime. Acceding to the Convention at this time is a positive step in the national interest of our country. The American Bar Association should come forward and place on record its positive support.

This resolution was overwhelmingly approved by the Council of the Section of International Law at its Mid-Winter Meeting on December 5-7, 1975.

Respectfully submitted.

RICHARD P. BROWN, Jr.,
Chairman, Section of International Law.

The CHAIRMAN. Let me say that we will keep the record open for you to provide responses for those. Regretfully, the floor is holding up now for me to get down for the Glenn-Percy amendment to the Defense Department bill which we are offering. I have asked the Senate floor to hold off for just a few minutes, so we will keep the record open then, and would appreciate your response on those submitted to us.

I would appreciate hearing from you again, Mr. Bitker, in summary.

Mr. BITKER. Mr. Chairman, in summary, I think there is nothing to be added to what I said before, to what this committee has, shall I say, suffered through on various occasions, and at various times it has always come up with the same conclusion. I urge this committee and its members to devote its time and energy to reporting this out favorably by this committee, and second, getting it on the floor of the Senate, to imposing cloture if a filibuster actually is attempted, and securing its passage on the floor in the Senate.

I think this is the single most important thing. I think the matter of discussing the merits has long gone by. That expresses my feelings about this now.

The CHAIRMAN. I thank you very much.

I would like to say that I am more optimistic about the possibilities now than I have been at any time since I entered the Senate 15 years ago. I do feel that we do have an overwhelming consensus in this committee. We will move it forward very rapidly, and there will be no obstructionism in the committee that I know of. The question will be on the floor.

I think there, as we have indicated before, the attitude of the administration is extremely important. I think whatever the ABA can do to have the same impact on the administration that it has had on this committee in your appearance here today would be extremely important. I think it would be terribly important for key Senators, and I don't know whether an ABA position is always embraced by lawyers in every State, but there are lawyers certainly in each State that would advance the ABA position. I think to the extent they can they should get across this point of view. There are so few who even realize today that the ABA is for this treaty. I still hear Senators saying, well, if the ABA is against this, how can I possible be for it? Does that automatically mean that they support everything that you support? No, not necessarily. But it does help. And in this case it will make an immense difference.

The combination of the two, Reagan administration support, if it comes, and ABA's active participation and support, will really move this forward, and it will not be an exercise in futility then. It can be a viable, good debate as this has been today. And we can get right down to it.

In closing, let me just read part of what Secretary Abrams said when he testified before this committee on November 17:

> I have not given the Genocide Treaty the intensive study that I now intend to give it, but it would be my hope that no problem arises in the review of it which would prevent me from reaching the conclusion that ratification is possible.

His personal inclination, he says, is this:

> My own predilection is to have the United States sign and ratify treaties such as the Genocide Treaty not because they are going to have any effect within the United States, where we are well beyond the minimum standards that these treaties would impose, but really because they have a certain standing in the international community and it is an embarrassment to us in some cases if we do not ratify when many other countries do.

Mr. BITKER. Mr. Chairman, I have one more comment. I think the public does not believe that this treaty has not been ratified. If you say to any citizen that the Genocide Treaty is still pending before the U.S. Senate, they just won't believe you.

The CHAIRMAN. I know.

Mr. BITKER. I think that is one other thing that maybe members of this committee as a result of the report that it may issue here may catch a headline or two in some fashion, so that the public will begin to recognize that this thing is still around.

The CHAIRMAN. Let me say that lunch hour has called most of the media and others who are in the room away. We do not have the crowded room that we did at the beginning of the hearing. I am very grateful to Senator Dodd for staying right with this issue. Do you have any concluding comments or questions?

Senator DODD. There is just one question that I want to ask all three members. I don't say that you have to have an answer at your fingertips, but I would like to have you submit a response to it.

The question that I have, which I raised earlier, though I don't know whether you were in the room or not at the time, is this. Everyone recognizes that genocide is a crime against international law. That is the substance of this convention. So it is my conclusion based on the Constitution, and I don't know if this has ever been adequately tested, that such a determination is not alien to the Constitution, but in fact is anticipated in article 1 of the Constitution.

The specific provision of article 1, section 8, clause 10, is that "Congress shall have power to define and punish offenses against the law of nations." Now, I am not sure, first of all, of the historical and legislative history of the law of nations as it was perceived by the Framers of the Constitution, but it would seem to me that they had something in mind along the lines of a Genocide Convention, and I am wondering if any analysis has been done of article 1, section 8, clause 10, as to whether or not there are already strong provisions in the Constitution in effect to endorse and support what the Genocide Convention attempts to do.

The CHAIRMAN. Professor Moore, I have to leave. They are holding up the floor for me. Senator Dodd will preside and will adjourn this session. Let me thank you all again for your kindness in being here.

Ambassador MOORE. Thank you, Mr. Chairman. Let me take a brief response to that, and then ask my colleagues to add anything they would care to.

I think you are absolutely correct. There is simply no question whatsoever under domestic law in the United States that the Federal Government, the Congress of the United States has the power under article 1 to pass laws making genocide a crime in terms of all of the elements of the crime that we have spelled out in the treaty. Indeed, if you look at the broader objection that some are raising, this question of aren't we somehow unconstitutionally interfering with the role of the States in this case, there are really two answers to that.

The answer that we already have Federal jurisdiction clearly to have precisely that result as something in the Constitution is one of those.

The second is that the Supreme Court has held for very good reasons that indeed treaties or valid executive agreements do take precedence over State law. That was what the Bricker amendment battle was about. Not the question as it has been cited earlier as to whether treaties override the Constitution of the United States.

We rightly decided, as we have again with legislation, that in the international sphere we must have the ability to speak with one voice, so I think for both of those reasons there is simply no question that there is no valid constitutional argument somehow of interference with the power of the States.

Mr. BITKER. I have nothing to add, Senator.

Judge BUERGENTHAL. I just want to agree and say that I have no doubt whatsoever that the Congress could without the Genocide Convention adopt legislation modeled totally on the Genocide Convention. There is no question about that.

Senator DODD [presiding]. We thank you, and we appreciate your testimony this morning. I could not agree more with Mr. Bitker. Let us get about the business of getting the votes and getting this treaty passed. It is a source of some significant embarrassment, I think, in effect. The gentleman from Liberty Lobby, Mr. Bartell, has left, but the fact is, Vietnam and other countries whose policies we find repugnant have ratified this treaty. This should only give us further reason to embrace the treaty as quickly as possible. Otherwise, our standing within the international community is hampered somewhat when we raise questions about genocide by other nations who are signatories to this particular convention.

As a signatory, as a nation who has ratified the Genocide Convention, we are in fact on firmer ground to raise our voice in international forums whenever such genocide does occur. We certainly find ourselves somewhat crimson, I think, when faced by allegations that our Nation holds itself out as a bastion of liberty, and then we have not, in fact, ratified the very convention which condemns that which we seek to condemn in others, so I could not agree with you more.

Again, I thank the three of you for being here today. Except for the responses which you will make to the questions that have been raised here this morning, this hearing will stand adjourned.

Ambassador MOORE. Thank you very much, Mr. Chairman.

[Whereupon, at 1:20 p.m., the committee adjourned, subject to call of the Chair.]

APPENDIX

CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE [1]

Adopted by the General Assembly of the United Nations on Dec. 9, 1948 [2]

[Entry into force: Jan. 12, 1951, in accordance with art. XIII. Registration: Jan. 12, 1951, No. 1021. Text: United Nations, Treaty Series, vol. 78, p. 277]

State	Signature	Ratification, accession (*), notification of succession (†)
Afghanistan		Mar. 22, 1956.*
Albania		May 12, 1955.*
Algeria		Oct. 31, 1963.*
Argentina		June 5, 1956.*
Australia [3]	Dec. 11, 1948	July 8, 1949.
Austria		Mar. 19, 1958.*
Bahamas		Aug. 5, 1975.†
Belgium [4]	Dec. 12, 1949	Sept. 5, 1951.
Bolivia	Dec. 11, 1948	
Brazil	Dec. 11, 1948	Apr. 15, 1952.
Bulgaria		July 21, 1950.*
Burma	Dec. 30, 1949	Mar. 14, 1956.
Byelorussian S.S.R	Dec. 16, 1949	Aug. 11, 1954.
Canada	Nov. 28, 1949	Sept. 3, 1952.
Chile	Dec. 11, 1948	June 3, 1953
China [5]	July 20, 1949	
Colombia	Aug. 12, 1949	Oct. 27, 1959.
Costa Rica		Oct. 14, 1950.*
Cuba	Dec. 28, 1949	Mar. 4, 1953.
Czechoslovakia	Dec. 28, 1949	Dec. 21, 1950.
Democratic Kampuchea		Oct. 14, 1950.*
Denmark	Sept. 28, 1949	June 15, 1951.
Dominican Republic	Dec. 11, 1948	
Ecuador	Dec. 11, 1948	Dec. 21, 1949.
Egypt	Dec. 12, 1948	Feb. 8, 1952.
El Salvador	Apr. 27, 1949	Sept. 28, 1950.
Ethiopia	Dec. 11, 1948	July 1, 1949.
Fiji		Jan. 11, 1973.†
Finland		Dec. 18, 1959.*
France	Dec. 11, 1948	Oct. 14, 1950.
Gambia		Dec. 29, 1978.*
German Democratic Republic		Mar. 27, 1973.*
Germany, Federal Republic of [6]		Nov. 24, 1954.*
Ghana		Dec. 24, 1958.*
Greece	Dec. 29, 1949	Dec. 8, 1954.
Guatemala	June 22, 1949	Jan. 13, 1950.
Haiti	Dec. 11, 1948	Oct. 14, 1950.
Honduras	Apr. 22, 1949	Mar. 5, 1952.
Hungary		Jan. 7, 1952.*
Iceland	May 14, 1949	Aug. 29, 1949.
India	Nov. 29, 1949	Aug. 27, 1959.
Iran	Dec. 8, 1949	Aug. 14, 1956.
Iraq		Jan. 20, 1959.*
Ireland		June 22, 1976.*
Israel	Aug. 17, 1949	Mar. 9, 1950.
Italy		June 4, 1952.*
Jamaica		Sept. 23, 1968.*
Jordan		Apr. 3, 1950.*
Lao People's Democratic Republic		Dec. 8, 1950.*
Lebanon	Dec. 30, 1949	Dec. 17, 1953.
Lesotho		Nov. 29, 1974.*
Liberia	Dec. 11, 1948	June 9, 1950.
Mali		July 16, 1974.*
Mexico	Dec. 14, 1948	July 22, 1952.
Monaco		Mar. 30, 1950.*
Mongolia		Jan. 5, 1967.*
Morocco		Jan. 24, 1958.*
Nepal		Jan. 17, 1969.*
Netherlands		June 20, 1966.*
New Zealand	Nov. 25, 1949	Dec. 28, 1978.

See footnotes at end of table.

CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE[1]—Continued

Adopted by the General Assembly of the United Nations on Dec. 9, 1948[2]

[Entry into force: Jan. 12, 1951, in accordance with art. XIII. Registration: Jan. 12, 1951, No. 1021. Text: United Nations Treaty Series, vol. 78, p. 277]

State	Signature	Ratification, accession (*), notification of succession (†)
Nicaragua		Jan. 29, 1952.*
Norway	Dec. 11, 1948	July 22, 1949.
Pakistan	Dec. 11, 1948	Oct. 12, 1957.
Panama	Dec. 11, 1948	Jan. 11, 1950.
Paraguay	Dec. 11, 1948	
Peru	Dec. 11, 1948	Feb. 24, 1960.
Philippines	Dec. 11, 1948	July 7, 1950.
Poland		Nov. 14, 1950.*
Republic of Korea		Oct. 14, 1950.*
[Republic of South Vietnam][7]		Aug. 11, 1950.*
Romania		Nov. 2, 1950.*
Rwanda		Apr. 16, 1975.*
Saudi Arabia		July 13, 1950.*
Spain		Sept. 13, 1968.*
Sri Lanka		Oct. 12, 1950.*
Sweden	Dec. 30, 1949	May 27, 1952.
Syrian Arab Republic		June 25, 1955.*
Tonga		Feb. 16, 1972.*
Tunisia		Nov. 29, 1956.*
Turkey		July 31, 1950.*
Ukrainian S.S.R.	Dec. 16, 1949	Nov. 15, 1954.
Union of Soviet Socialist Republics	Dec. 16, 1949	May 3, 1954.
United Kingdom[8]		Jan. 30, 1970.*
United States of America	Dec. 11, 1948	
Upper Volta		Sept. 14, 1965.*
Uruguay	Dec. 11, 1948	July 11, 1967.
Venezuela		July 12, 1960.*
Yugoslavia	Dec. 11, 1948	Aug. 29, 1950.
Zaire		May 31, 1962.†
Additions:		
Barbados		Jan. 14, 1980.*
Vietnam		June 9, 1981.*

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[1] For other multilateral treaties concluded in the field of human rights, see chapters V, VII, XVI, XVII and XVIII.

[2] Resolution 260 (III), see "Official Records of the General Assembly, Third Session" part I (A/810), p. 174.

[3] In a notification made on ratification, the Government of Australia extended the application of the Convention to all territories for the conduct of whose foreign relations Australia is responsible.

[4] In a notification received by the Secretary-General on Mar. 13, 1952, the Government of Belgium extended the application of the Convention to Belgian Congo and the Trust Territory of Ruanda Urundi.

[5] Ratified on behalf of the Republic of China on July 19, 1951. See note concerning signatures, ratifications. accessions etc., on behalf of China, Preface, p. iii.

[6] In a note accompanying the instrument of accession, the Government of the Federal Republic of Germany stated that the Convention would also apply to "Land Berlin."

With reference to the above-mentioned declaration, a communication from the German Democratic Republic was received by the Secretary-General on Dec. 27, 1973. The text of the communication is identical, mutatis mutandis, to that published in footnote 3, 4th par. p. 52.

In this connection, the Secretary-General received from the Governments of France, the United Kingdom of Great Britain and Northern Ireland and the United States of America June 17, 1974, and July 8, 1975), the Federal Republic of Germany (July 15, 1974, and Sept. 19, 1975), the Union of Soviet Socialist Republics (Sept. 12, 1974, and Dec. 8, 1975) and the Ukrainian Soviet Socialist Republic (Sept. 19, 1974), communications identical in essence, mutatis mutandis) to the corresponding ones reproduced in footnote 3, p. 52.

[7] See note 4b, p. 54.

[8] In a notification made on accession, the Government of the United Kingdom extended the application of the Convention to the following territories for whose conduct of international relations the United Kingdom is responsible: Channel Islands, Isle of Man; Dominica, Grenada, St. Lucia, St. Vincent; Bahamas, Bermuda, British Virgin Islands, Falkland Islands and Dependencies, Fiji, Gibraltar, Hong Kong, Pitcairn, St. Helena and Dependencies, Seychelles, Turks and Caicos Islands.

In a notification received by the Secretary-General on June 2, 1970, the Government of the United Kingdom extended the application of the Convention to the Kingdom of Tonga for whose international relations the United Kingdom is or was then responsible.

94TH CONGRESS }
2d Session }

SENATE

{ EX. REPORT
{ No. 94–23

INTERNATIONAL CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

Mr. HUMPHREY, from the Committee on Foreign Relations,
submitted the following

REPORT

ON

EXECUTIVE O, 81ST CONGRESS, 1ST SESSION

APRIL 29, 1976.—Ordered to be printed

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94th Congress, 2d Session | SENATE | Executive Rept. No. 94-23

INTERNATIONAL CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

April 26, 1976.—Ordered to be printed

Mr. Humphrey, from the Committee on Foreign Relations, submitted the following

REPORT

[To accompany Ex. O, 81st Cong., 1st sess.]

The Committee on Foreign Relations, to which was referred the International Convention on the Prevention and Punishment of the Crime of Genocide (Ex. O, 81st Cong., first sess.), having considered the same, reports favorably thereon with three understandings and one declaration and recommends that the Senate advise and consent to ratification thereof.

1. Main Purpose

The purpose of the treaty is to make genocide an international crime, whether committed during peace or war. To that end, the treaty defines genocide to be certain enumerated acts, which are punishable whether committed by constitutionally responsible rulers. public officials, or private individuals. Other articles deal with implementing legislation, trial of persons charged with genocide, extradition, reference to the United Nations, and settlement of disputes regarding interpretation or application of the convention. These provisions are described in detail below as are the understandings and declaration the text of which follows:

> 1. That the U.S. Government understands and construes the words "intent to destroy, in whole or in part, a national ethnical, racial, or religious group, as such" appearing in article II, to mean the intent to destroy a national, ethnical, racial, or religious

group by the acts specified in article II in such manner as to affect a substantial part of the group concerned.

2. That the U.S. Government understands and construes the words "mental harm" appearing in article II(b) of this convention to mean permanent impairment of mental faculties.

3. That the U.S. Government understands and construes article VI of the convention in accordance with the agreed language of the Legal Committee of the United Nations General Assembly that nothing in article VI shall affect the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside the state.

4. That the U.S. Government declares that it will not deposit its instrument of ratification until after the implementing legislation referred to in article V has been enacted.

2. Background of the Convention

While genocide is not new it was the Hitler persecution of various minorities, particularly the Jews, during World War II that gave impetus to this convention. Drafted under United Nations auspices, it was adopted by the General Assembly on December 9, 1948, by a vote of 55 to 0, and entered into force in 1951. As of today, 82 nations are parties to it.

On June 16, 1949, the convention was transmitted by President Truman to the Senate. Hearings were held by a subcommittee of the Foreign Relations Committee in 1950, and the convention was favorably reported to the full committee together with recommended understandings and a declaration. No final committee action, however, was taken.

In 1953, Secretary of State John Foster Dulles expressed "some doubt as to whether * * * the Genocide Treaty is going to accomplish the purposes which were in the minds of those who drafted it." Dulles added: "I believe that the solution of the problem which must be envisaged by that treaty could better be reconsidered at a later date. I would not press at the moment for its ratification."

In 1963, Secretary of State Dean Rusk said that the Kennedy administration would ratify the Genocide Convention if the Senate gave its advice and consent, and this was repeated on behalf of the Johnson administration in 1965.

On February 19, 1970, President Nixon urged the Senate "to consider anew this important convention and to grant its advice and consent to ratification." Such action, said the President, "will demonstrate unequivocally our country's desire to participate in the building of international order based on law and justice." The President added that "the Attorney General concurs in the Secretary of State's judgment that there are no constitutional obstacles to United States ratification."

3. Committee Action

The committee considered the Genocide Convention at several meetings in 1970 and, because the last hearings were held in 1950, decided to refer the convention to a subcommittee consisting of Senator Church, chairman, and Senators Symington, Pell, Cooper, and Javits.

On April 1, the subcommittee announced that it would hold hearings on April 24 and 27 on the constitutional and legal implications of the Genocide Convention. These hearings took place as scheduled and everyone who asked to testify was heard. Specific invitations were sent to representatives of the American Bar Association but declined at that time. A further hearing was held on May 22 to receive the views of Senator Ervin.

The subcommittee considered the convention in executive session on May 12 and subsequently recommended that the full committee report the convention favorably with understandings.

On July 28, 1970, the full committee by a vote of 6 to 5 ordered the convention reported favorably to the Senate but reconsidered this vote by a vote of 7 to 5. The votes on the two motions follow: To report favorably, ayes, Senator Fulbright, Church, Symington, Pell, McGee, Javits; nays, Senator Sparkman, Mansfield, Aiken, Cooper, and Williams of Delaware. To reconsider the vote, ayes, Senators Sparkman, Mansfield, Church, Aiken, Case, Cooper, and Williams of Delaware; nays, Senators Fulbright, Symington, Pell, McGee, and Javits. A request by the American Bar Association to be heard on the Convention was received under date of September 17 and this was considered at a meeting on November 23. The committee then took note of the fact that the House of Delegates of the American Bar Association in February rejected by a vote of 130 to 126 a motion to reverse its opposition to ratification of the Genocide Convention and therefore upheld the 1949 resolution presented to the committee at the 1950 hearings. (In February 1976, the ABA reversed its position and now supports the Genocide Convention.) The committee, after further discussion on November 23, voted 10 to 2 to report the convention favorably to the Senate, subject to the understandings and declaration. The vote was as follows: voting in the affirmative, Senators Fulbright, Mansfield, Gore, Church, Symington, Pell, Aiken, Case, Javits, and McGee; voting in the negative, Senators Sparkman and Cooper.

The convention was formerly reported to the Senate on December 8, 1970, but was not brought to a vote before the close of the 92d Congress. In accordance with subsection 2 of rule XXVII of the Standing Rules of the Senate the treaty was returned to the Committee on Foreign Relations at the beginning of the 92d Congress.

Inasmuch as a fresh start had to be made on the convention in 1971, the committee decided to hold one more hearing for the purpose of taking testimony from those not previously heard. This was done on March 10 and the record of this hearing is printed and available to the Senate.

On March 30, 1971, after thorough discussion, the committee again voted 10 to 4 to report the convention favorably to the Senate subject to the understandings and declaration previously recommended. Voting in the affirmative were Senators Fulbright, Church, Symington, Pell, McGee, Muskie, Spong, Case, Javits, and Scott. Voting in the negative were Senators Sparkman, Aiken, Cooper, and Pearson. Prior to this vote, the committee voted to table a reservation offered by Senator Cooper (which is further discussed in a later section of this report), by a vote of 7 to 6, as follows: in favor of tabling, Senators Fulbright, Church, Pell, McGee, Muskie, Javits, and Scott;

against tabling, Senators Sparkman, Spong, Aiken, Case, Cooper, and Pearson.

The 92d Congress adjourned without further action on the convention and again, in accordance with subsection 2 of rule XXVII of the Standing Rules of the Senate, the treaty was rereferred to the Committee on Foreign Relations, where it was considered at an executive session on February 27, 1973 and ordered reported by a voice vote.

The Convention was debated by the Senate on December 19, 1973, January 28, 29, and 30, 1974, and February 1, 4, and 5, 1974. On February 5, 1974 a cloture motion failed of passage by a vote of 55 to 36. On February 6, 1974 a second cloture motion failed by a vote of 55 to 38. The Convention was automatically re-referred to the Committee on Foreign Relations at the beginning of the Ninety-Fourth Congress. The Committee considered the Convention in public session on April 13, 1976 and, by a voice vote, ordered it reported with a favorable recommendation.

It was the view of the Committee that further hearings on the treaty were not warranted in view of the voluminous record made on the matter in hearings in 1950, 1970, and 1971. A few words summarizing the hearings may be helpful. In 1950, representatives of numerous groups, with a claimed total combined membership of approximately 100 million people urged ratification. Only the American Bar Association appeared in opposition. In addition to the executive branch, represented by witnesses from the Departments of State and Justice, the following organizations presented favorabe testimony in 1970 and 1971: the American Civil Liberties Union, Ad Hoc Committee on the Human Rights and Genocide Treaties, New York State Bar Association Committee on International Law, Ukrainian Congress Committee of America, and the U.S. Constitution Council. Individuals testifying in favor were Senator William Proxmire and Bruno Bitker, attorney at law. Organizations testifying against the convention were the American Coalition of Patriotic Societies, the Liberty Lobby, and the American Bar Association. Individuals presenting opposition testimony were Senator Sam J. Ervin, Jr., Senator Russell Long, Harry Leroy Jones, attorney at law, and Dr. William L. Pierce (representing himself as a "white American and as a National Socialist"). Other statements were submitted for the record. In connection with the latest hearings, the committee expresses its appreciation to the Ad Hoc Committee on the Human Rights and Genocide Treaties for representing 53 national citizens organizations which otherwise might have sought to present testimony on their own. These 53 constituent organizations, composed of religious, veterans, labor, social, ethnical, and women's groups are listed on pages 113 and 114 of the 197 hearings.

In recommending the Convention to the Senate, the Committee notes that the American Bar Association has reversed its previous position and now supports the Genocide Convention with the understandings and the declaration recommended by the Committee in 1973 and, again, in this instance. Notice of the adoption of a resolution of approval of the Convention at the February 1976 meeting of the House of Delegates of the American Bar Association was communicated to Senator Sparkman by Mr. Herbert D. Sledd, Secretary, American Bar Association by letter dated February 27, 1976. The Committee believes that the change in position by the ABA is a significant development that deserves thoughtful consideration by members of the Senate who, in the past, may have had doubts about the Genocide Convention.

This makes the fourth time that the Committee on Foreign Relations has recommended the Genocide Convention to the Senate. Much of this report is adapted from earlier reports by the Committee and reaffirmed now. The issues and the arguments pro and con remain the same.

4. PROVISIONS OF THE CONVENTION

Because the term "genocide" has been so loosely bandied about, the committee wishes to be quite explicit in the following analysis on what it construes the provisions of the convention to mean. Articles X to XIX are entirely procedural in nature; thus only articles I to IX are discussed below:

GENOCIDE—AN INTERNATIONAL CRIME

ARTICLE I

> The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

The article largely speaks for itself. It adds genocide to a number of other international crimes which nations have agreed to punish in international agreements pertaining to such matters as protection of submarine cables, pelagic sealing, oil pollution, antisocial conduct such as slave trading, and production and trade in narcotics.

In the past, the power of the United States under the Constitution to make treaties in the human rights field has been questioned on the grounds that the treatment by a state of its nationals is a matter of domestic jurisdiction. This was one of the points once raised in opposition to the Genocide Convention by officials of the American Bar Association. The argument runs that the definition of crimes and prescription of punishment is a matter of purely domestic—and not international—concern and therefore the treaty making power does not extend to this area. On both moral and practical grounds, the commission of genocide, involving as it must mass action, cannot help but be of concern to the community of nations. An indication that this is so is the fact that 82 nations have subscribed to the proposition that genocide is an international crime.

The committee also finds some merit in the argument that if the U.S. Government is conceded the power to make treaties governing the killing of seals, it is capable of acceding to a treaty on the killing of people.

ACTS CONSTITUTING GENOCIDE

ARTICLE II

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;

> (b) Causing seriously bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.

The testimony and discussion of article II have turned on the alleged vagueness of certain of its terms—"in whole or in part," "group," "as such," and "mental harm." While the committee had no particular problem with the meaning of these words, in order to allay any misconceptions, it recommends to the Senate two understandings to this article:

> (1) That the U.S. Government understands and construes the words "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such" appearing in article II to mean the intent to destroy a national, ethnical, racial, or religious group by the acts specified in article II in such a manner as to affect a substantial part of the group concerned.
>
> (2) That the U.S. Government understands and construes the words "mental harm" appearing in article II(b) to mean permanent impairment of mental facilities.

The first of these understandings serves to emphasize the importance which the committee attaches to the word "intent." Basic to any charge of genocide must be the *intent* to destroy an entire group because of the fact that it is a certain national, ethnical, racial, or religious group, in such a manner as to affect a substantial part of the group. There have been allegations that school busing, birth control clinics, lynchings, police actions with respect to the Black Panthers, and the incidents at My Lai constitute genocide. The committee wants to make clear that under the terms of article II none of these and similar acts is genocide unless the *intent* to destroy the group as a group is proven. Harassment of minority groups and racial and religious intolerance generally, no matter how much to be deplored, are not outlawed per se by the Genocide Convention. Far from outlawing discrimination, article II is so written as to make it, in fact, difficult to prove the "intent" element necessary to sustain a charge of genocide against anyone.

In its construction of article II, the committee is not only expressing its own view but also that of the Department of State in testimony presented in 1950 by then Deputy Under Secretary of State Dean Rusk:

STATEMENT OF DEAN RUSK, DEPUTY UNDER SECRETARY OF STATE, BEFORE THE GENOCIDE SUBCOMMITTEE, JANUARY 23, 1950—EXCERPT

MR. RUSK. * * * Genocide, as defined in article II of the convention, consists of the commission of certain specified acts, such as killing or causing serious bodily harm to in-

> dividuals who are members of a national, ethnical, racial, or religious group, with the intent to destroy that group. The legislative history of article II shows that the United Nations negotiators felt that it should not be necessary that an entire human group be destroyed to constitute the crime of genocide, but rather that genocide meant the partial destruction of such a group *with the intent to destroy the entire group concerned.*
>
> Senator McMahon. That is important. They must have the intent to destroy the entire group.
>
> Mr. Rusk. That is correct.
>
> Senator McMahon. In other words, an action leveled against one or two of a race or religion would not be, as I understand it, the crime of genocide. They must have the intent to go through and kill them all.
>
> Mr. Rusk. That is correct. This convention does not aim at the violent expression of prejudice which is directed against individual members of groups.
>
> Senator Lodge. Is that the difference between genocide and homicide?
>
> Mr. Rusk. That is the principal difference, yes. [Emphasis supplied.]

The second of the understandings was suggested by the executive branch in 1949, and while the executive branch no longer considers this understanding to be necessary, the committee thinks it will be helpful to eliminate any doubt as to what is meant by "mental harm."

These two understandings are further defined in the implementing legislation which is printed as an appendix to this report.

Some witnesses deplored the omission of "political" groups in article II. While inclusion of the word "political" might have been desirable, the difficulty of defining a "political group" would have raised further questions about the scope of the convention. In any event, the absence of this word from the treaty is no reason not to protect the groups that are covered by it.

PUNISHABLE ACTS

ARTICLE III

> The following acts shall be punishable:
>
> (a) Genocide;
> (b) Conspiracy to commit genocide;
> (c) Direct and public incitement to commit genocide;
> (d) Attempt to commit genocide;
> (e) Complicity in genocide.

The principal question about the meaning of article III concerned the relationship of the words "direct and public incitement to commit genocide" to the freedom of speech guarantees of the first amendment. This question was raised with then Assistant Attorney General William H. Rehnquist in 1970 as follows:

> Senator Church. In other words, you are satisfied that such constitutional protection, as presently exists in the field

of free speech, would not be adversely effected in any way by the terms of this convention?

Mr. REHNQUIST. I am satisfied, first, that they would not be and, second, that they could not be.

The 1969 case of *Brandenburg* v. *Ohio* was cited by several witnesses as the most recent reaffirmation of the line drawn by the Supreme Court between protected speech and prohibited direct and immediate incitement to action. In that case, the Court said: "* * * the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." (395 U.S. 444.) This is a 1969 per curiam decision of the Supreme Court and there is no reason to expect any reversal of this doctrine, with which the language of the Genocide Convention is consistent.

Among those citing this case was the witness for the American Civil Liberties Union who added: "* * * if this convention did interfere with the first amendment, the American Civil Liberties Union would be the first one to be complaining, without regard to whether or not we commend the objectives of the convention. However, we do not think there is any problem under the first amendment to the Constitution."

PUNISHMENT OF PERSONS

ARTICLE IV

> Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

While most of the testimony on this article attempted to establish that governments, as well as individuals, could be held responsible for commission of genocidal acts, the committee believes that this argument is somewhat strained. The article clearly refers to "persons." The government's responsibility is to punish such persons, whether they are constitutionally responsible rulers, public officials, or private individuals. Since it is unlikely that genocide could be committed without the explicit or implicit approval of the government of the country in which it occurred, the absence of specific reference to governments in article IV could be considered a drawback. However, the committee points out that there is nothing the international community could effectively do to prevent and punish government-instigated genocide in any case. To be sure, charges could be brought before the International Court of Justice and the United Nations to bring moral pressures to bear on the offenders but that is all. Thus, while on the one hand the committee believes that the convention would have been stronger for being directed at governments as well as individuals, on the other hand it recognizes that there exists no present means in international law to punish a government in power. A successor government would, of course, be obligated under the convention to bring charges against its former public officials for genocidal acts.

Implementing Legislation

ARTICLE V

> The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for the persons guilty of genocide or of any of the other acts enumerated in article III.

This article makes clear that the convention is not to be construed as self-executing and that implementing legislation is required to give effect to its provisions. Indeed, the committee regards Senate approval of the convention as the first in a two-step procedure. The Department of State is already on record as proposing to recommend to the President that the instrument of ratification of the convention not be deposited until the implementing legislation has been enacted. This statement by the Department has been incorporated into a declaration to be included in the resolution of ratification as follows:

> 4. That the United States Government declares that it will not deposit its instrument of ratification until after the implementing legislation referred to in Article V has been enacted.

While Senate approval constitutes the first step towards the United States becoming a party to the treaty, the committee attaches equal importance to the second step—enactment of the implementing legislation. The committee has not concerned itself directly with the implementing legislation in the belief that this should be judged on its own merits. In light of the interest expressed in this legislation, however, the committee asked the executive branch to expedite its submission to the Congress which it did. Introduced originally in the 92d Congress, this legislation was reintroduced on March 17, 1976 by Senators Hugh Scott and Javits as S. 3155 and is reproduced in the appendix for the information of the Senate, inasmuch as it will be helpful in the consideration of the convention as an indication of how the domestic law is proposed to be shaped to fulfill our treaty obligations.

The argument made during the course of the hearings that in the absence of a treaty the Congress would have no power to enact the kind of legislation required by the treaty is discussed below in the section on "The Convention and the Constitution" but the committee notes at this point its belief that the Congress is fully empowered to define certain acts as Federal crimes, as it has already done in many instances—as the killing of heads of state and other foreign officials—and is continuing to do in other categories.

Trial of Persons Charged With Genocide

ARTICLE VI

> Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have

> jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

This article provoked considerable discussion, not because of its language but because of the means suggested for its implementation. Executive branch and other testimony brought out that the negotiating history of the convention makes it clear that the courts of the country in which the accused has citizenship can likewise have jurisdiction over the crime. This theory of concurrent jurisdiction—jurisdiction based on the site of the alleged offense and jurisdiction based on the nationality of the offender—was thoroughly explored during the hearings. It was pointed out that a number of nations particularly colonial powers, have consistently asserted the right to try their own nationals for crimes committed outside their territory. Even the United States in certain limited areas—counterfeiting, theft of Government property, treason, antitrust violations—has exercised jurisdiction over its citizens for acts committed abroad. This concept of concurrent jurisdiction no doubt will be closely examined during consideration of the implementing legislation. However, the U.S. Government should make it clear to the other contracting parties that it intends to construe article VI so as to permit it to try its own nationals for punishable genocidal acts whether committed at home or abroad. For this reason, the committee recommends to the Senate the following understanding:

> (3) That the U.S. Government understands and construes article VI of the convention in accordance with the agreed language of the report of the Legal Committee of the United Nations General Assembly that nothing in article VI shall affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State.

The pertinent excerpt from the report referred to in the understanding follows:

REPORT OF THE SIXTH COMMITTEE—U.N. DOCUMENT A/760 AND CORR. 2

[3 December 1948]

[Excerpt]

> 24. At its 131st meeting, the Committee had agreed to insert in its report to the General Assembly the substance of an amendment to article VI submitted by the representative of India, according to which nothing in the article should affect the right of any State to bring to trial before its own tribunals any of its nationals for *acts committed outside the State*. Following this, the representative of Sweden had requested that the report should also indicate that article VI did not deprive a State of jurisdiction in the case of *crimes committed against its nationals outside national territory*. After some discussion of the questions raised in this connexion, the Committee, at its 134th meeting, adopted, by 20 votes to 8, with 6 abstentions, an explanatory text[1] for insertion in the present report. [Emphasis supplied.]

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[1] The text reads as follows:

"The first part of article VI contemplates the obligation of the State in whose territory acts of genocide have been committed. Thus, in particular, *it does not affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State*." [Emphasis supplied.]

It should go without saying that the United States cannot exercise jurisdiction unless the accused is in U.S. territory.

Only brief reference needs to be made to the clause in article VI which provides that persons charged with genocide shall be tried "by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction." No such international penal tribunal has been established and the International Court of Justice has no penal or criminal jurisdiction. That part of article VI is therefore a dead letter at this time. If a penal tribunal should be established—and there are no present plans to do so—separate action either through ratification of a treaty or enactment of a law would be required for the United States to accept its jurisdiction.

EXTRADITION

ARTICLE VII

> Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purposes of extradition.
>
> The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article VII has no immediate effect. It does not constitute an extradition treaty in itself. It obligates the contracting parties to grant extradition in accordance with their laws and treaties in force and neither U.S. law, nor any extradition treaty to which the United States is a party, covers genocide at this time.

The question of extradition has been carefully examined by the committee in the light of concerns that American citizens might be extradited for trial in foreign courts without the protection of U.S. constitutional guarantees. Ratification of the Genocide Convention, however, does not affect any problem which may exist in this respect. It merely opens the way for adding one more crime—genocide—to the list of crimes for which Americans may be extradited under ratified extradition treaties. Extradition treaties are carefully worded to be as explicit as possible about the definition of the crimes covered and the procedure under which a citizen will be surrendered to another nation for trial. No general sweeping accusation would suffice.

During the extensive committee discussion of the extradition article in 1971, Senator Cooper offered the following reservation:

> That a U.S. Citizen in the United States charged with having committed an act outside the United States in violation of the treaty provisions shall not be subject to extradition unless the Secretary of State determines such person is guaranteed all the constitutional rights of an accused under our Federal laws.

The committee voted 7 to 6 to table this reservation, not so much because members were opposed to its thrust as because such policy would be more properly expressed in the implementing legislation.

In this connection, the committee calls particular attention to Sec. 3 of the implementing legislation which reads:

> SEC. 3. It is the sense of the Congress that the Secretary of State in negotiating extradition treaties or conventions shall

reserve for the United States the right to refuse extradition of a United States national to a foreign country for an offense defined in chapter 50A of title 18, United States Code, when the offense has been committed outside the United States, and

(a) where the United States is competent to prosecute the person whose surrender is sought, and intends to exercise its jurisdiction, or

(b) where the person whose surrender is sought has already been or is at the time of the request being prosecuted for such offense.

ROLE OF THE UNITED NATIONS

ARTICLE VIII

> Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

In the discussion of this article, the question was raised whether it would broaden or enlarge the powers of the United Nations. Genocide, as the term is accepted by the committee, namely, mass murder on a broad scale, would either jeopardize human rights provisions of the charter or pose a threat to world peace and therefore it would clearly be within the powers of the United Nations to discuss it. The article itself moreover refers to "action under the Charter of the United Nations" which limits its scope to that document, including the article 2(7) proscription against intervention "in matters which are essentially within the domestic jurisdiction of any state * * *."

As a practical matter, whether we are a party to the Genocide Convention or not, the United Nations can discuss alleged genocide in the United States or anywhere else any time it so chooses. The committee moreover is quite certain that for propaganda and other purposes spurious charges of this nature will continue to be made in the United Nations, whether we do or do not ratify the Genocide Convention, if only because our position in the world makes us a visible target of discontent. Indeed, we lend more color to such charges by not being a party to the Genocide Convention. This being the case, the question whether article VIII gives the United Nations greater scope to discuss genocide seems relatively immaterial. It is important, moreover, in this connection to bear in mind that such enforcement powers as the United Nations has are lodged in the Security Council, subject to the veto power, which the United States now has demonstrated it is prepared to exercise.

SETTLEMENT OF DISPUTES

ARTICLE IX

> Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in

> article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

The jurisdiction of the Court will extend to disputes relating to the interpretation, application, or fulfillment of the convention, including those relating to the responsibility of a state for genocide. It must be noted that such cases will fall under article 36(1) of the Court's statute which provides:

> 1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or *in treaties and conventions in force*. (Emphasis added.)

Cases arising under the Genocide Convention will not be covered by the Connally amendment under which the United States reserves to itself the right to determine which cases is considers to be within its domestic jurisdiction and therefore outside the jurisdiction of the Court. The Connally amendment applies only to article 36(2)—the so-called compulsory jurisdiction clause.

Provisions similar to Article IX are included in many multilateral and bilateral conventions to which the United States is a party. A list of these appears on page 215 of the 1970 hearings. Prominent examples include the Japanese Peace Treaty, the Antartic Treaty, and the Statute of the International Atomic Energy Agency.

It must also be noted that a number of countries, notably Communist countries, have ratified the treaty subject to the reservation that they do not consider themselves bound by article IX. Other countries have taken exception to this action. The United States is expected to do likewise. As a consequence, the United States could invoke the reservation in its own behalf in cases brought by countries making such a reservation.

The committee does not envisage any real difficulties resulting from article IX. No disputes arising from alleged violations of the Genocide Convention have been decided by the Court to date. This is not to say, of course, that the United States might not be someday charged with nonfulfillment of the treaty by another signatory and might even be found in default of its treaty obligation—though this is hard to conceive—bust as a practical matter that is where it would end. The Court has no enforcement powers. It is also well to recall that only states party to the Statute can bring cases before the World Court—not individuals or groups. In the committee's view, the fears expressed about the role of a moribund court in genocide matters appear very far fetched.

5. The Convention and the Constitution

Discussion of the Genocide Convention during the hearings renewed the debate over whether a treaty can authorize what the Constitution prohibits. The Supreme Court, in its own words, "has regularly and uniformly recognized the supremacy of the Constitution over a treaty" (*Reid* v. *Covert*, 354 U.S. 1, 16–18). It is therefore fallacious to claim that the Genocide Convention will supersede or set aside the Constitution of the United States. It will not and cannot do so.

A related argument was raised by some witnesses to the effect that the Congress would have no power to enact legislation making genocide a crime if the convention were not approved. The power of Congress to do so rests on article I, section 8, clause 10, of the Constitution: "The Congress shall have the Power * * * To Define and Punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations * * * ," as well as on the necessary and proper clause. The fact that the Congress enacts a statute pursuant to a treaty, as would be the case in the Genocide Convention, does not alter its competence to enact such legislation in any event.

As regards the respective jurisdiction of Federal and State governments over the crime of genocide, if the treaty is approved, the committee calls attention to Sec. 2 of the proposed implementing legislation, which provides:

> SEC. 2. The remedies provided in this Act shall be the exclusive means of enforcing the rights based on it, but nothing in the Act shall be construed as indicating an intent on the part of the Congress to occupy to the exclusion of State or local laws on the same subject matter, the field in which the provisions of the Act operate nor shall those provisions be construed to invalidate a provision of State law unless it is inconsistent with the purposes of the Act or the provisions of it.

6. UNDERSTANDINGS AND RESERVATIONS

The understandings and declaration which the committee agreed to recommend to the Senate have been discussed in the text of the report as well as reproduced at the beginning and in the resolution of ratification which is included in this report.

There was considerable discussion as to the nature and effect of these understandings. For this reason, there follows a memorandum on this question, prepared at the committee's request by the Department of State.

DEPARTMENT OF STATE.
Washington, D.C., March 26, 1971.

Hon. J. W. FULBRIGHT,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: In the hearings on March 10, 1971, on the Genocide Convention before a subcommittee of the Senate Foreign Relations Committee, questions were raised concerning the difference between a "reservation" and an "understanding" and as to the legal effect of the latter. In response to Senator Javits' request, I enclose a memorandum on the subject, prepared in the Office of the Legal Advisor.

There was also some discussion in the hearings as to whether the understandings to the Genocide Convention recommended by the Foreign Relations Committee in Executive Report No. 91-25 were properly designated as such or whether they should more appropriately be termed reservations. I would like to take this occasion to express the view of the Department of State that the proposed understandings and declarations set forth in the report are properly designated. We feel that it is neither necessary nor desirable to redesignate any of them as reservations.

The first of these understandings merely serves to emphasize that the element of "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" is basic in proving a charge of genocide, and consequently proof would be required that the genocidal acts charged had been committed "in such a manner as to affect a substantial part of the group concerned."

The second proposed understanding construes the words "mental harm" in article II to mean "permanent impairment of mental faculties." This construction is in keeping with the generally understood meaning of the term in the context of article II. It would make clear that the term could not be construed as applying to various lesser forms of mental harassment toward minority groups. This construction is consistent with the negotiating history of the convention.

The third proposed understanding is explicitly based on the negotiating record of the convention, which clearly adopts the interpretation that nothing in Article VI shall affect the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside the state. The possibility of concurrent jurisdiction thus created is supported not only by the negotiating record but by the practice of other states.

The Department regards all three of these understandings as consistent with the terms of the convention and as not excluding or modifying their legal effect.

We trust that this information will be useful in answering the questions raised in the subcommittee hearings, but if we can be of any further assistance, please let us know.

We are looking forward to prompt and favorable action on the Genocide Convention by the committee and the Senate as a whole.

Sincerely yours,

DAVID M. ABSHIRE,
Assistant Secretary for Congressional Relations.

Enclosure: Memorandum.

[From the Office of the Legal Adviser, Department of State, March 22, 1971]

MEMORANDUM CONCERNING RESERVATIONS AND UNDERSTANDINGS TO TREATIES

A statement made in or accompanying the ratification of a treaty constitutes a reservation when it would exclude or vary the legal effect of one or more of the provisions of the treaty in their application to the reserving State.

A statement made in or accompanying the ratification of a treaty which merely explains or clarifies the meaning of the provisions of the treaty but does not exclude or vary their legal effect would constitute an understanding.

A statement intended by a ratifying State to exclude or to modify the legal effect of one or more provisions of a treaty as applied to that State should be designated by that State as a "reservation". Where a State wishes to set forth its interpretation of the provisions of a treaty without intending

> to change their legal effect as understood by it, the statement should be designated as an "understanding".
>
> The designation by the ratifying State is not controlling. Whether the statement modifies the legal effect of the treaty or merely expresses its true intent depends on the substance of the statement and is not solely within the judgment of the State making the statement.
>
> A statement made as a condition to a State's ratification, whether designated as a "reservation" or an "understanding", is communicated by the depository to the other signatory and acceding States. Each of those States has the right to decide whether the statement modifies the legal effect of the treaty and whether it will consider itself in treaty relations with the reserving State. Failure of other States to object within a reasonable time may be regarded as acceptance by them of the reservation or understanding, which thereupon has legal effect internationally as a condition to the ratification of the State making it.
>
> In United States law a condition placed by the Senate on its approval of a treaty—whether by reservation or by understanding—and included by the President in the instrument of ratification takes effect as domestic law along with the treaty itself. This is a necessary result of the shared constitutional role of the President and the Senate in the treaty-making process.

It is to be noted that the term "reservation" applies only when a statement accompanying ratification "would exclude or vary the legal effect of one or more of the provisions of the treaty in their application to the reserving state." None of the statements recommended by the committee, nor indeed otherwise suggested to date, falls under this definition since, in the view of the committee concurred in by the Department of State, they are consistent with the treaty, its negotiating history, and the practice of other contracting states. Indeed, it can be argued that they merely describe the tenor of the implementing legislation to be enacted which is a matter of our domestic concern.

The same logic also applies to the argument that the committee-sponsored understandings somehow weaken or lessen the effect of U.S. ratification of the treaty. It is the committee's view that undertaking to explain what the convention means to the United States in no way downgrades the treaty or the obligations assumed by the U.S. under its provisions. It is a legitimate exercise of the Senate's advice and consent function. The essential point remains that ratification of the convention is worthwhile, regardless of the effect of the understandings.

A related concern that the Supreme Court would disregard the proposed understandings reverts to the allegation that the understandings contravene the explicit language of the convention despite the committee's expressed view to the contrary. The Supreme Court can be expected to give full weight to the view of the committee and the negotiating history of the convention in any matter that might come before the Court in connection with the treaty.

7. WHAT THE CONVENTION DOES NOT DO

At the risk of being repetitious, the committee emphasizes again what the convention does not do.

—It does not alter the rules of warfare, or the obligations of parties to the Geneva conventions on the treatment of prisoners of war and protection of civilan persons in time of war.

—It does not apply to civil wars as such.

—It does not apply to persecutions such as the Soviet treatment of Jews.

—It does not apply to discrimination, racial slurs, insults, and the like.

—It does not apply to voluntary population control measures.

—It does not apply to the past.

Charges that any or all of these actions might constitute genocide in one nation or another have been bandied about loosely over the years, but the committee again wishes to emphasize that a charge does not constitute proof of an act of genocide. In every case, the element of intent is crucial.

Genocide is what the convention says and not what crusaders for human rights, no matter how well motivated, allege. The convention, in fact, leaves so many areas unaffected that this is, oddly enough, one of the main criticisms made by some opponents. The committee was told in past hearings that the convention "is so full of holes" as to be worthless and that the United States should instead work to persuade the United Nations to negotiate a convention with teeth in it—one which would cover political groups and governments and which would correct other alleged deficiencies.

8. CONCLUSIONS

Genocide has become a word in altogether too common usage. The committee therefore has been careful in this report to narrow its meaning and not to overstate the scope of the convention. We have been concerned largely with describing what it does not do. We find no substantial merit in the arguments against the convention.

Indeed, there is a note of fear behind most arguments—as if genocide were rampant in the United States and this Nation could not afford to have its actions examined by international organs—as if our Supreme Court would lose its collective mind and make of the treaty something it is not—as if we as a people don't trust ourselves and our society. The rhetoric of the opponents, and to a degree the proponents, has obscured what a modest step the convention represents.

Philosophical, moral, and constitutional questions have been raised which go far beyond this modest step and probe man's relationship to his fellow man and the responsibilities of governments to protect the rights of their citizens. These questions appear inherent in the area of human rights treaties and legislation, and it is good that they are raised, because they serve to lift our sights to what is really at issue here, an attempt to curb the excesses of mankind. As our planet becomes more crowded, man's behavior towards his fellows must be governed by standards ever higher and more humane. This treaty seeks to set a higher standard of international morality and should be judged on that basis.

This higher plane of viewing the convention is suggested in the following statements of our Presidents:

The words of President Truman in submitting the Genocide Convention in 1949 still hold true:

> By giving its advice and consent to my ratification of this convention, which I urge, the Senate of the United States will demonstrate that the United States is prepared to take effective action on its part to contribute to the establishment of principles of law and justice.

The words of President Kennedy, in submitting three related human rights treaties, also apply:

> The day-to-day unfolding of events makes it ever clearer that our own welfare is interrelated with the rights and freedoms assured the peoples of other nations. * * * There is no society so advanced that it no longer needs periodic recommitment to human rights. The United States cannot afford to renounce responsibility for support of the very fundamentals which distinguish our concept of government from all forms of tyranny.

And finally, the committee concurs with the words of President Nixon:

> I believe we should delay no longer in taking the final convincing step which would reaffirm that the United States remains as strongly opposed to the crime of genocide as ever.

The committee, therefore, earnestly recommends to the Senate that, subject to the understandings and declaration, the Senate give its advice and consent to ratification of the Genocide Convention by an overwhelming vote. Respect for the feelings of mankind, expressed by the 82 ratifications to date, should lead to no less.

9. Text of Resolution of Ratification

Resolved (*two-thirds of the Senators present concurring therein*), That the Senate advise and consent to the ratification of the International Convention on the Prevention and Punishment of the Crime of Genocide, adopted unanimously by the General Assembly of the United Nations in Paris on December 9, 1948, and signed on behalf of the United States on December 11, 1948 (Executive O, Eighty-first Congress, first session), subject to the following understandings and declaration:

1. That the United States Government understands and construes the words "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such" appearing in Article II, to mean the intent to destroy a national, ethnical, racial, or religious group by the acts specified in Article II in such manner as to affect a substantial part of the group concerned.

2. That the United States Government understands and construes the words "mental harm" appearing in Article II(b) of this Convention to mean permanent impairment of mental faculties.

3. That the United States Government understands and construes Article VI of the Convention in accordance with the agreed language of the Report of the Legal Committee of the United Nations General Assembly that nothing in Article VI shall affect the right of any State to bring to trial before its own tribunals any of its nations for acts committed outside the State.

4. That the United States Government declares that it will not deposit its instrument of ratification until after the implementing legislation referred to in Article V has been enacted.

10. APPENDIX

TEXT OF LETTER TRANSMITTING THE GENOCIDE CONVENTION TO THE SENATE, INCLUDING THE TEXT OF THE CONVENTION

81ST CONGRESS } SENATE { EXECUTIVE
1st Session } { O

INTERNATIONAL CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

A CERTIFIED COPY OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, ADOPTED UNANIMOUSLY BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS IN PARIS ON DECEMBER 9, 1948, AND SIGNED ON BEHALF OF THE UNITED STATES ON DECEMBER 11, 1948

JUNE 16, 1949.—Convention was read the first time and the injunction of secrecy was removed therefrom. The convention, the President's message of transmittal, and the report by the Acting Secretary of State were referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate

THE WHITE HOUSE, *June 16, 1949.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith a certified copy of the convention on the prevention and punishment of the crime of genocide, adopted unanimously by the General Assembly of the United Nations in Paris on December 9, 1948, and signed on behalf of the United States on December 11, 1948.

The character of the convention is explained in the enclosed report of the Acting Secretary of State. I endorse the recommendations of the Acting Secretary of State in his report and urge that the Senate advise and consent to my ratification of this convention.

In my letter of February 5, 1947, transmitting to the Congress my first annual report on the activities of the United Nations and the participation of the United States therein, I pointed out that one of the important achievements of the General Assembly's first session was the agreement of the members of the United Nations that genocide constitutes a crime under international law. I also emphasized that America has long been a symbol of freedom and democratic progress to peoples less favored than we have been and that we must maintain their belief in us by our policies and our acts.

By the leading part the United States has taken in the United Nations in producing an effective international legal instrument outlawing the world-shocking crime of genocide, we have established before the world our firm and clear policy toward that crime. By giving its advice and consent to my ratification of this convention, which I urge, the Senate of the United States will demonstrate that the United States is prepared to take effective action on its part to contribute to the establishment of principles of law and justice.

HARRY S. TRUMAN.

(Enclosures: (1) Report of the Acting Secretary of State, (2) certified copy of convention on the prevention and punishment of genocide.)

DEPARTMENT OF STATE,
Washington, D. C.

The PRESIDENT,
The White House:

I have the honor to transmit to you a certified copy of the convention on the prevention and punishment of the crime of genocide, adopted unanimously by the General Assembly of the United Nations in Paris on December 9, 1948, with the recommendation that it be submitted to the Senate for its advice and consent to ratification.

The convention defines genocide to mean certain acts, enumerated in article II, committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such. These acts are discussed below.

The basic purpose of the convention is the prevention of the destruction of a human group as such. The first resolution of the General Assembly on this subject, 96 (I), adopted unanimously by the members of the United Nations on December 11, 1946, succinctly pointed out that—

> Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings.

The resolution also pointed out that genocide shocks the conscience of mankind, results in great losses to humanity and is contrary to moral law. Of course, homicide also is shocking, results in losses to humanity and is contrary to moral law. The distinction between those two crimes, therefore, is not a difference in underlying moral principles, because in the case of both crimes, moral principles are equally outraged. The distinction is that in homicide, the individual is the victim; in genocide, it is the group.

The General Assembly declared in this resolution that the physical extermination of human groups, as such, is of such grave and legitimate international concern that civilized society is justified in branding genocide as a crime under international law. The extermination of entire human groups impairs the self-preservation of civilization itself. The recent genocidal acts committed by the Nazi

Government have placed heavy burdens and responsibilities on other countries, including our own. The millions of dollars spent by the United States alone on refugees, many of them victims of genocide, and the special immigration laws designed to take care of such unfortunates illustrate how genocide can deeply affect other states. On September 23, 1948, Secretary of State Marshall stated that—

> Governments which systematically disregard the rights of their own people are not likely to respect the rights of other nations and other people and are likely to seek their objectives by coercion and force in the international field.

It is not surprising, therefore, to find the General Assembly of the United Nations unanimously declaring that genocide is a matter of international concern.

Thus, the heart of the convention is its recognition of the principle that the prevention and punishment of genocide requires international cooperation. However, the convention does not substitute international responsibility for state responsibility. It leaves to states themselves the basic obligation to protect entire human groups in their right to live. On the other hand it is designed to insure international liability where state responsibility has not been properly discharged.

The convention was carefully drafted and, indeed, represents the culmination of more than 2 years of thoughtful consideration and treatment in the United Nations, as the following important steps in its formulation demonstrate:

The initial impetus came on November 2, 1946, when the delegations of Cuba, India, and Panama requested the Secretary-General of the United Nations to include in the agenda of the General Assembly an additional item: the prevention and punishment of the crime of genocide. The Assembly referred the item to its Sixth (Legal) Committee for study.

At its fifty-fifth plenary meeting on December 11, 1946, the Assembly adopted, without debate and unanimously, a draft resolution submitted by its Legal Committee. This resolution, referred to above, affirmed that "genocide is a crime under international law." It recommended international cooperation with a view to facilitating the prevention and punishment of genocide, and, to this end, it requested the Economic and Social Council of the United Nations to undertake the necessary studies to draw up a draft convention on the crime.

Pursuant to this resolution a draft convention on genocide was prepared by the ad hoc Committee on Genocide in the spring of 1948, under the chairmanship of the United States representative on this committee. This draft was again discussed by the Economic and Social Council in July and August 1948 in Geneva, and then in the Legal Committee of the General Assembly at its third regular session in Paris, where again the United States delegation played an important role in the formulation of the draft convention.

On December 9, 1948, the General Assembly unanimously adopted the convention to outlaw genocide, which was signed by the United States 2 days later. When signing, the United States representative said, in part:

> I am privileged to sign this convention on behalf of my Government, which has been proud to take an active part in the effort of the United Nations to bring this convention into being.

> The Government of the United States considers this an event of great importance in the development of international law and of cooperation among states for the purpose of eliminating practices offensive to all civilized mankind.

Genocide is a crime which has been perpetrated by man against man throughout history. Although man has always expressed his horror of this heinous crime, little or no action had been taken to prevent and punish it. The years immediately preceding World War II witnessed the most diabolically planned and executed series of genocidal acts ever before committed. This time there was to be more than mere condemnation. A feeling of general repulsion swept over the world, and following the war manifested itself in the General Assembly's resolution of December 1946. It is this resolution to which the Legal Committee gave full content by providing the General Assembly with a legal instrument designed not only to prevent genocidal acts but also to punish the guilty.

The genocide convention contains 19 articles. Of these, the first 9 are of a substantive character, and the remaining 10 are procedural in nature.

The preamble is of a general and historical nature.

Article I carries into the convention the concept, unanimously affirmed by the General Assembly in its 1946 resolution, that genocide is a crime under international law. In this article the parties undertake to prevent and to punish the crime.

Article II specifies that any of the following five acts, if accompanied by the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, constitutes the crime of genocide:

(*a*) Killing members of the group;

(*b*) Causing serious bodily or mental harm to members of the group;

(*c*) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(*d*) Imposing measures intended to prevent births within the group; and

(*e*) Forcibly transferring children of the group to another group.

This article, then, requires that there should be a specific intent to destroy a racial, religious, national, or ethnical group as such in whole or in part. With respect to this article the United States representative on the Legal Committee said:

> I am not aware that anyone contends that the crime of genocide and the crime of homicide are one and the same thing. If an individual is murdered by another individual, or indeed by a government official of a state, a crime of homicide has been committed and a civilized community will punish it as such. Such an act of homicide would not in itself be an international crime. To repeat the opening language of the resolution of the General Assembly of December 1946, "genocide is a denial of the right of existence of entire human groups." This remains the principle on which we are proceeding.
>
> However, if an individual is murdered by another individual, or by a group, whether composed of private citizens or government officials, as part of a plan or with the intent to destroy one of the groups enumerated in article 2, the international legal crime of genocide is committed as well as the municipal-law crime of homicide.

The destruction of a group may be caused not only by killing. Bodily mutilation or disintegration of the mind caused by the imposition of stupefying drugs may destroy a group. So may sterilization of a group, as may the dispersal of its children.

Article III of the convention specifies that five acts involving genocide shall be punishable. These five genocidal acts are—

(*a*) The crime of genocide itself;
(*b*) Conspiracy to commit genocide;
(*c*) Direct and public incitement to commit genocide;
(*d*) Attempt to commit genocide; and
(*e*) Complicity in genocide.

The parties agree, in article IV, to punish guilty persons, irrespective of their status.

In article V the parties undertake to enact, "in accordance with their respective constitutions", the legislation necessary to implement the provisions of the convention. The convention does not purport to require any party to enact such legislation otherwise than in accordance with the country's constitutional provisions.

Article VI makes it clear that any person charged with the commission of any of the five genocidal acts enumerated in article III shall be tried by a court of the state in whose territory the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those states accepting such jurisdiction. Thus, the commission in American territory of genocidal acts would be tried only in American courts. No international tribunal is authorized to try anyone for the crime of genocide. Should such a tribunal be established, Senate advice and consent to United States ratification of any agreement establishing it would be necessary before such an agreement would be binding on the United States.

By article VII the parties agree to extradite, in accordance with their laws and treaties, persons accused of committing genocidal acts; none of such acts is to be considered a political crime for the purpose of extradition. The United States representative on the Legal Committee, in voting in favor of the convention on December 2, 1948, said:

> With respect to article VII regarding extradition, I desire to state that until the Congress of the United States shall have enacted the necessary legislation to implement the convention, it will not be possible for the Government of the United States to surrender a person accused of a crime not already extraditable under existing laws.

Existing United States law provides for extradition only when there is a treaty therefor in force between the United States and the demanding government. Only after Congress has defined, and provided for the punishment of, the crime of genocide, and authorized surrender therefor, will it be possible to give effect to the provisions of article VII.

Article VIII recognizes the right of any party to call upon the organs of the United Nations for such action as may be appropriate under the Charter for the prevention and suppression of any of the acts enumerated in article III. This article merely affirms the right of the United Nations to call upon an organ of the United Nations in matters within its jurisdiction.

Article IX provides that disputes between the parties relating to the interpretation, application, or fulfillment of the convention, including disputes relating to the responsibility of a state for any of the acts enumerated in article III, shall be submitted to the International Court of Justice, when any party to a dispute so requests.

On December 2, 1948, in voting in favor of the genocide convention, the representative of the United States made the following statement before the Legal Committee of the General Assembly:

> I wish that the following remarks be included in the record verbatim:
>
> Article IX provides that disputes between the contracting parties relating to the interpretation, application, or fulfillment of the present convention, "including those relating to the responsibility of a state for genocide or any of the other acts enumerated in article III," shall be submitted to the International Court of Justice. If "responsibility of a state" is used in the traditional sense of responsibility to another state for injuries sustained by nationals of the complaining state in violation of principles of international law and similarly, if "fulfillment" refers to disputes where interests of nationals of the complaining state are involved, these words would not appear to be objectionable. If, however, "responsibility of a state" is not used in the traditional sense and if these words are intended to mean that a state can be held liable in damages for injury inflicted by it on its own nationals, this provision is objectionable and my Government makes a reservation with respect to such an interpretation.

In view of this statement, I recommend that the Senate give its advice and consent to ratification of the convention—

> with the understanding that article IX shall be understood in the traditional sense of responsibility to another state for injuries sustained by nationals of the complaining state in violation of principles of international law, and shall not be understood as meaning that a state can be held liable in damages for injuries inflicted by it on its own nationals.

The remaining articles are procedural in nature. By article XIV the convention is to be effective for an initial period of 10 years from the date it enters into force, and thereafter for successive periods of 5 years with respect to those Parties which have not denounced the convention by written notification to the Secretary-General of the United Nations at least 6 months before the expiration of the current period.

Article XV provides that if there are less than 16 parties to the convention, as a result of denunciations, the convention shall cease to be in force from the effective date of the denunciation which reduces the number of parties to less than 16.

Article XVI authorizes any party to request revision of the convention, by notification in writing to the Secretary-General of the United Nations. The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

It is my firm belief that the American people together with the other peoples of the world will hail United States ratification of this convention as another concrete example of our repeatedly affirmed determination to make the United Nations the cornerstone of our foreign policy and a workable institution for international peace and security.

Respectfully submitted.

James E. Webb,
Acting Secretary.

(Enclosure: Certified copy of convention on the prevention and punishment of genocide.)

CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world;

Recognizing that at all periods of history genocide has inflicted great losses on humanity; and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,

Hereby agree as hereinafter provided:

ARTICLE I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

ARTICLE II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(*a*) Killing members of the group;

(*b*) Causing serious bodily or mental harm to members of the group;

(*c*) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(*d*) Imposing measures intended to prevent births within the group;

(*e*) Forcibly transferring children of the group to another group.

ARTICLE III

The following acts shall be punishable:

(*a*) Genocide;
(*b*) Conspiracy to commit genocide;
(*c*) Direct and public incitement to commit genocide;
(*d*) Attempt to commit genocide;
(*e*) Complicity in genocide.

ARTICLE IV

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

ARTICLE V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III.

ARTICLE VI

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

ARTICLE VII

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

ARTICLE VIII

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

ARTICLE IX

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

ARTICLE X

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

ARTICLE XI

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950 the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

ARTICLE XII

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

ARTICLE XIII

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a *procès-verbal* and transmit a copy thereof to each Member of the United Nations and to each of the non-member States contemplated in article XI.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

ARTICLE XIV

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

ARTICLE XV

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

ARTICLE XVI

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

ARTICLE XVII

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in article XI of the following:

(*a*) Signatures, ratifications and accessions received in accordance with article XI;

(*b*) Notifications received in accordance with article XII;

(*c*) The date upon which the present Convention comes into force in accordance with article XIII;

(*d*) Denunciations received in accordance with article XIV;

(*e*) The abrogation of the Convention in accordance with article XV;

(*f*) Notifications received in accordance with article XVI.

ARTICLE XVIII

The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to each Member of the United Nations and to each of the non-member States contemplated in article XI.

ARTICLE XIX

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

For Afghanistan:

For Argentina:

For Australia:
Herbert Evatt December 11, 1948

For the Kingdom of Belgium:

For Bolivia:
Adolfo Costa du Rels 11 Dec. 1948

For Brazil:
Joao Carlos Muniz 11 December 1948

For the Union of Burma:

For the Byelorussian Soviet Socialist Republic:

For Canada:

For Chile:
Con la reserva que requiere tambien la aprobacion del Congreso de mi pais.
H. Arancibia Lazo

For China:

For Colombia:

For Costa Rica:

For Cuba:

For Czechoslovakia:

For Denmark:

For the Dominican Republic:
J E Balaguer — 11 Dec 1948

For Ecuador:
Homero Viteri Lafronte — 11 Diciembre de 1948

For Egypt:
Ahmed Moh. Khachaba — 12-12-48

For El Salvador:

For Ethiopia:
Aklilou — 11 December 1948

For France:
Robert Shuman — 11 Dec 1948

For Greece:

For Guatemala:

For Haiti:
Castel Demesmin — Le 11 Deciembre 1948

For Honduras:

For Iceland:

For India:

For Iran:

For Iraq:

For Lebanon:

For Liberia:
Henry Cooper — 11/12/48

For the Grand Duchy of Luxembourg:

For Mexico:
Luis Padilla Nervo — Dec. 14, 1948

For the Kingdom of the Netherlands:

For New Zealand:

For Nicaragua:

For the Kingdom of Norway:
Finn Moe — Le 11 Decembre 1948

For Pakistan:
Zafrulla Khan — Dec. 11, '48

For Panama:
R. J. Alfaro 11 Diciembre 1948

For Paraguay:
Carlos A. Vasconsellos Diciembre 11, 1948

For Peru:
F Berckemeyer Diciembre 11/1948

For the Philippine Republic:
Carlos P. Romulo December 11, 1948

For Poland:

For Saudi Arabia:

For Siam:

For Sweden:

For Syria:

For Turkey:

For the Ukrainian Soviet Socialist Republic:

For the Union of South Africa:

For the Union of Soviet Socialist Republics:

For the United Kingdom of Great Britain and Northern Ireland:

For the United States of America:
Ernest A. Gross Dec. 11, 1948

For Uruguay:
Enrique C. Armand Ugon Decembre 11 de 1948

For Venezuela:

For Yemen:

For Yugoslavia:
Ales Bebler 11 Dec. 1948

Certified true copy.
For the Secretary-General:
Kerno
Assistant Secretary-General in charge of the Legal Department.

33

IMPLEMENTING LEGISLATION

94th CONGRESS
2d Session

S. 3155

IN THE SENATE OF THE UNITED STATES

March 17, 1976

Mr. Hugh Scott (for himself and Mr. Javits) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To implement the Convention on the Prevention and Punishment of the Crime of Genocide.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) title 18, United States Code, is amended by adding after chapter 50 the following new chapter:

"Chapter 50A.—GENOCIDE

"Sec.
"1091. Definitions.
"1092. Genocide.

"§ 1091. Definitions

"As used in this chapter—

"(1) 'National group' means a set of persons whose identity as such is distinctive in terms of nationality or national origins from the other groups or sets of persons forming the population of the nation of which it is a part or from the groups or sets of persons forming the international community of nations.

"(2) 'Ethnic group' means a set of persons whose identity as such is distinctive in terms of its common cultural traditions or heritage from the other groups or sets of persons forming the population of the nation of which it is a part or from the groups or sets of persons forming the international community of nations.

"(3) 'Racial group' means a set of persons whose identity as such is distinctive in terms of race, color of skin, or other physical characteristics from the other groups or sets of persons forming the population of the nation of which it is a part or from the groups or sets of persons forming the international community of nations.

"(4) 'Religious group' means a set of persons whose identity as such is distinctive in terms of its common religious creed, beliefs, doctrines, or rituals from the other groups or sets of persons forming the population of the nation of which it is a part or from the groups or sets of persons forming the international community of nations.

"(5) 'Substantial part' means a part of the group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity.

"(6) 'Children' means persons who have not attained the age of eighteen and who are legally subject to the care, custody, and control of their parents or of an adult of the group standing in loco parentis.

"§ 1092. Genocide

"(a) Whoever, being a national of the United States or otherwise under or within the jurisdiction of the United States, willfully without justifiable cause, commits, within or without the territory of the United States in time of peace or in time of war, any of the following acts with the intent to destroy by means of the commission of that act, or with the intent to carry out a plan to destroy, the whole or a substantial part of a national, ethnic, racial, or religious group shall be guilty of genocide:

"(1) kills members of the group;

"(2) causes serious bodily injury to members of the group;

"(3) causes the permanent impairment of the mental faculties of members of the group by means of torture, deprivation of physical or physiological needs, surgical operation, introduction of drugs or other foreign substances into the bodies of such members, or subjection to psychological or psychiatric treatment calculated to permanently impair the mental processes, or nervous system, or motor functions of such members;

"(4) subjects the group to cruel, unusual, or inhumane conditions of life calculated to bring about the physical destruction of the group or a substantial part thereof;

"(5) imposes measures calculated to prevent birth within the group as a means of effecting the destruction of the group as such; or

"(6) transfers by force the children of the group to another group, as a means of effecting the destruction of the group as such.

"(b) Whoever is guilty of genocide or of an attempt to commit genocide shall be fined not more than $20,000, or imprisoned for not more than twenty years, or both; and if death results shall be subject to imprisonment for any term of years or life imprisonment. Whoever directly and publicly incites another to commit genocide shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"(c) The intent described in subsection (a) of this section is a separate element of the offense of genocide. It shall not be presumed solely from the commission of the act charged.

"(d) If two or more persons conspire to violate this section, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000 or imprisoned not more than five years or both.

"(e) The offenses defined in this section, wherever committed, shall be deemed to be offenses against the United States.".

(b) The analysis of title 18, United States Code, is amended by adding after the item for chapter 50 the following new item:

"50A. Genocide .... 1091".

SEC. 2. The remedies provided in this Act shall be the exclusive means of enforcing the rights based on it, but nothing in the Act shall be construed as indicating an intent on the part of the Congress to occupy, to the exclusion of State or local laws on the same subject matter, the field in which the provisions of the Act operate nor shall those provisions be construed to invalidate a provision of State law unless it is inconsistent with the purposes of the Act or the provisions of it.

SEC. 3. It is the sense of the Congress that the Secretary of State in negotiating extradition treaties or conventions shall reserve for the United States the right to refuse extradition of a United States national to a foreign country for an offense defined in chapter 50A of title 18, United States

Code, when the offense has been committed outside the United States, and

(a) where the United States is competent to prosecute the person whose surrender is sought, and intends to exercise its jurisdiction, or

(b) where the person whose surrender is sought has already been or is at the time of the request being prosecuted for such offense.

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LIST OF NATIONS WHICH HAVE RATIFIED THE

CONVENTION OF THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

Adopted by the General Assembly of the United Nations on 9 December 1948

Entry into force: 12 January 1951, in accordance with article XIII.

State	Signature	Ratification, accession,[1] notification of succession[2]
Afghanistan		Mar. 22, 1956.[1]
Albania		May, 12, 1955.[1]
Algeria		Oct. 31, 1963.[1]
Argentina		June 5, 1956.[1]
Australia	Dec. 11, 1948	July 8, 1949.
Austria		Mar. 19, 1958.[1]
Bahamas		Aug. 5, 1975.[2]
Belgium	Dec. 12, 1949	Sept. 5, 1951.
Brazil	Dec. 11, 1948	Apr. 15, 1952.
Bulgaria		July 21, 1950.[1]
Burma	Dec. 30, 1949	Mar. 14, 1956.
Byelorussian SSR	Dec. 16, 1949	Aug. 11, 1954.
Canada	Nov. 28, 1949	Sept. 3, 1952.
Chile	Dec. 11, 1948	June 3, 1953.
China	July 20, 1949	July 19, 1951.
Colombia	Aug. 12, 1949	Oct. 27, 1959.
Costa Rica		Oct. 14, 1950.[1]
Cuba	Dec. 28, 1949	Mar. 4, 1953.
Czechoslovakia	Dec.28, 1949	Dec. 21, 1950.
Denmark	Sept. 28, 1949	June 15, 1951.
Ecuador	Dec. 11, 1948	Dec. 21, 1949.
Egypt	Dec. 12, 1948	Feb. 8, 1952.
El Salvador	Apr. 27, 1949	Sept. 28, 1950.
Ethiopia	Dec. 11, 1948	July 1, 1949.
Fiji		Jan. 11, 1973.[2]
Finland		Dec. 18, 1959.[1]
France	Dec. 11, 1948	Oct. 14, 1950.
German Democratic Republic		Mar. 27, 1973.[1]
Germany, Federal Republic of		Nov. 24, 1954.[1]
Ghana		Dec. 24, 1958.[1]
Greece	Dec. 29, 1949	Dec. 8, 1954.
Guatemala	June 22, 1949	Jan. 13, 1950.
Haiti	Dec. 11, 1948	Oct. 14, 1950.
Honduras	Apr. 22, 1949	Mar. 5, 1952.[1]
Hungary		Jan. 7, 1952.
Iceland	May 14, 1949	Aug. 29, 1949.
India	Nov. 29, 1949	Aug. 27, 1959.
Iran	Dec. 8, 1949	Aug. 14, 1956.[1]
Iraq		Jan. 20, 1959.
Israel	Aug. 17, 1949	Mar. 9, 1950.
Italy		June 4, 1952.[1]
Jamaica		Sept. 23, 1968.[1]
Jordan		Apr. 3, 1950.[1]
Khmer Republic		Oct. 14, 1950.[1]
Laos		Dec. 8, 1950.[1]
Lebanon	Dec. 30, 1949	Dec. 17, 1953.
Lesotho		Nov. 29, 1974.[1]
Liberia	Dec. 11, 1948	June 9, 1950.
Mali		July 16, 1974.[1]
Mexico	Dec. 14, 1948	July 22, 1952.
Monaco		Mar. 30, 1950.[1]
Mongolia		Jan. 5, 1967.[1]
Morocco		Jan. 24, 1958.[1]
Nepal		Jan. 17, 1969.[1]
Netherlands		June 20, 1966.[1]
Nicaragua		Jan. 29, 1952.[1]
Norway	Dec. 11, 1948	July 22, 1949.
Pakistan	do	Oct. 12, 1957.
Panama	do	Jan. 11, 1950.
Paraguay	do	
Peru	do	Feb. 24, 1960.
Philippines	do	July 7, 1950.
Poland		Nov. 14, 1950.[1]
Republic of Korea		Oct. 14, 1950.[1]
Republic of Vietnam		Aug. 11, 1950.[1]
Romania		Nov. 2, 1950.[1]
Rwanda		Apr. 16, 1975.[1]
Saudi Arabia		July 13, 1950.[1]
Spain		Sept. 13, 1968.[1]
Sri Lanka		Oct. 12, 1950.[1]
Sweden	Dec. 30, 1949	May 27, 1952.
Syria		June 25, 1955.[1]
Tonga		Feb. 15, 1972.[1]
Tunisia		Nov. 29, 1956.[1]
Turkey		July 31, 1950.[1]
Ukrainian SSR	Dec. 16, 1949	Nov. 1954.
U.S.S.R.	do	May 3, 1954.[1]
United Kingdom		Jan. 30, 1970.[1]
Upper Volta		Sept. 14, 1965.[1]
Uruguay	Dec. 11, 1948	July 11, 1967.
Venezuela		July 12, 1960.[1]
Yugoslavia	Dec. 11, 1948	Aug. 29, 1950.
Zaire		May 31, 1962.[2]

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Text of Resolution of Ratification

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the International Convention on the Prevention and Punishment of the Crime of Genocide, adopted unanimously by the General Assembly of the United Nations in Paris on December 9, 1948, and signed on behalf of the United States on December 11, 1948 (Executive O, Eighty-first Congress, first session) subject to the following understandings and declaration:

1. That the United States Government understands and construes the words "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such" appearing in article II, to mean the intent to destroy a national, ethnical, racial, or religious group by the acts specified in article II in such manner as to affect a substantial part of the group concerned.

2. That the United States Government understands and construes the words "mental harm" appearing in article II (b) of this Convention to mean permanent impairment of mental faculties.

3. That the United States Government understands and construes article VI of the Convention in accordance with the agreed language of the Report of the Legal Committee of the United Nations General Assembly that nothing in article VI shall affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the United States.

4. That the United States Government declares that it will not deposit its instrument of ratification until after the implementing legislation referred to in article V has been enacted.

AMERICAN CIVIL LIBERTIES UNION,
Washington Office, December 21, 1981.

Hon. CHARLES PERCY,
Chairman, Committee on Foreign Relations,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: I am writing on behalf of the American Civil Liberties Union in support of ratification of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide.

As we did in testimony before the Committee on Foreign Relations in 1970, the American Civil Liberties Union strongly endorses the ratification of this U.N. Convention on Genocide. This Convention, adopted by the United Nations in 1948, has been ratified or acceded to by 89 countries. The provisions of the Convention are fully in accordance with the Constitution, laws and ideals of the United States. Ratification of the Genocide Convention is, therefore, a proper exercise of the treaty-making power of the Constitution.

I do not think it is necessary to repeat the constitutional and legal arguments so thoroughly covered by the hearings and reports on the Convention, but I would like to comment briefly on one point in which the ACLU has a particular interest and, we think, some special competence. Some critics of this Convention have argued that ratification would conflict with the First Amendment. The ACLU is well known for its vigorous efforts to protect First Amendment rights and we would not hesitate to criticize this Convention if it violated the First Amendment. But it clearly does not. Ratification is in fact consistent with the decisions of the Supreme Court which over the years have amplified the scope of the constitutional guarantees of speech and press.

Critics point to Article III of the Convention, which makes it a crime to engage in "direct and public incitement to commit genocide," as evidence for their assertion that the Convention infringes the First Amendment guarantees of freedom of speech and press. This assertion is erroneous. The First Amendment does not protect conduct which involves efforts to incite to immediate unlawful action. This standard is fully consistent with Supreme Court decisions drawing the line between protected speech and prohibited direct and immediate incitement to criminal conduct. This standard has been enunciated by the Court in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), where the Court said:

"... the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation *except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action*." (Emphasis added.)

Although the Convention's standard meets the *Brandenburg* standard, one further point should be mentioned to negate any fear of conflict with the First Amendment. Should a particular indictment produce a conflict between the Convention and the First Amendment, the First Amendment would prevail. Article V of the Convention obligates the contracting parties to enact, "in accordance with their respective Constitutions," implementing legislation necessary to make these offenses punishable in their countries. Moreover, it is axiomatic that, as a matter of constitutional law, a treaty could not validly obligate the United States to do anything the Constitution prohibits. If a case arose under implementing legislation enacted by the Congress to make "direct and public incitement to commit genocide" a criminal offense in the United States, the accused person would still have to be prosecuted and convicted under those criminal procedures which protect all persons accused of committing a crime in this country. The Supreme Court could invalidate a conviction if it found that the acts with which the defendant was charged were protected by the First Amendment and did not constitute the kind of incitement which falls outside the protection of the First Amendment. In short, ratification of the Convention would in no way diminish the Court's power to apply the First Amendment.

As the constitutional objections to the Convention have been shown by many to be without substance, there is no legal obstacle to U.S. ratification of this Convention. The United States should move promptly toward ratification. This country played a leading role in the adoption of the Genocide Convention by unanimous vote of the members of the United Nations General Assembly in 1948. Since then the United States has continued to work for the promotion of human rights through the United Nations. However, the United States' failure to ratify this Convention in the thirty-three years since its adoption, when coupled with a similar lack of movement on some of the other human rights conventions, casts serious doubt on the sincerity of our efforts and of our stated commitment to human rights. Our concern about human rights in the international community must be accompanied by a willingness to obligate ourselves to act in accordance with these same international standards. Ratification of the Genocide Convention would be a long overdue step in the pursuit of truly effective international human rights throughout the world.

Thank you for this opportunity to express our views.

Yours sincerely,

JOHN SHATTUCK,
Director.

PREPARED STATEMENT OF WALTER HOFFMANN, CAMPAIGN FOR U.N. REFORM, WAYNE, N.J.

It is amazing that over 30 years have passed since the United States played a major role in helping to draft an International Convention on the Prevention and Punishment of the Crime of Genocide, and still the U.S. Senate has not ratified that convention, although the United States was one of the first nations to sign it. Almost every other prominent member of the United Nations has now ratified the Convention, including the U.S.S.R., the United Kingdom, Canada, France, Mexico and the Scandinavian countries. How can we hold our heads high among the nations when our country, which has always been a haven for the persecuted, which prides itself on granting its citizens more freedom and protection in the area of individual liberty and thought than any country in the history of the world, refuses to ratify a convention that simply makes genocide a crime under international law, which we agree to prevent and punish?

Administration after administration, from Truman to Kennedy to Nixon, called upon the Senate to give their consent. Your records are replete with State department reports and testimony of scholars that make it clear the treaty would not and cannot supercede the U.S. Constitution; that the treaty would not diminish the right of free speech; that the treaty does not increase existing Federal powers vis-a-vis the States; and that the treaty does not make our citizens subject to prosecution abroad unless we specifically provide for such an eventuality, in which case we can also provide for adequate due process procedures to be used.

It may be worth remembering that the earliest opposition to the Genocide Convention seems to have stemmed primarily from a fear of the expanded use of treaties in general, which is no longer even a relevant consideration in view of the thousands of multinational treaties we have entered into since 1949. In its 1969 report recommending that the United States ratify the Convention on the Prevention and Punishment of the Crime of Genocide, the Section of Individual Rights and Responsibilities of the American Bar Association tackles this and every other objection originally made to ratification and factually documents why these do not hold up and should not deter the Senate from ratifying the Convention. The Senate Foreign Relations Committee Report printed in March 1973, following hearings held in 1970 and 1971, also reviews point by point the questions raised and concludes on Page 18, "We find no substantial merit in the arguments against the convention."

Because we know that you have reviewed the same records that we have, which explore in point by point detail the consequences of entering into this treaty, and because you have also heard testimony on these points by exports, we will only expound in detail on two salient points, that we think are of special concern, and which may not have been sufficiently emphasized by others.

1. In regard to ratification impinging on the exercise of free speech, as has been contended by some: Assistant Attorney General William H. Rehnquist testified in 1970 that such constitutional protection as presently exists in the field of free speech would not and could not be adversely affected by the Convention. The American Civil Liberties Union, which has suffered much adverse publicity because of the lengths to which it has gone to defend free speech, concurred in this view. Moreover, the treaty is clearly consistent with the Supreme Court decision in *Brandenburg* v. *Ohio*, in which the Court drew this line, "the constitutional guarantee of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." (395 U.S. 444.) The language of the Genocide Convention is consistent with the Court's finding in this case.

2. Who will try those accused of genocide and under what protection? Perhaps the greatest fear in regard to ratification of the Genocide Treaty has been the oft repeated contention that ratification would subject American citizens to trial in foreign countries like North Vietnam on false charges of genocide. First, although specific acts of genocide may be against part of a group, the intent to commit genocide against the group as a whole must be shown to be covered under the Convention. Second, ratification of the Convention in and of itself will not allow any American citizen to be extradited on a charge of genocide unless we have negotiated an extradition treaty to include genocide with the country in question. In the case of North Vietnam we do not have an extradition treaty. Third, the treaty itself provides that "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in Article III." Further, Article VI of the convention states "Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to these Contracting Parties which shall have accepted its jurisdiction."

In regard to the above, several things must be noted. No international tribunal has been established to date. Therefore accepting the jurisdiction of such a tribunal if it is established would be a separate act. Moreover, during the testimony to the Senate in its hearings during 1970 and 1971 it was made clear based on the negotiating history of the Convention that the courts in the country in which the accused has citizenship can likewise have jurisdiction over the crime. In its recommendation in 1971, the Senate Foreign Relations Committee called on the U.S. Government to make clear that it intends to construe Article VI so as to permit it to try its own nationals for punishable genocidal acts.

In this regard, and because the convention is not self-executing as indicated in Article III, implementing legislation must be adopted to give effect to the Convention's provision if the Senate agrees to ratify it. For this purpose, draft legislation to add a Chapter 50A—Genocide—to Title 18, U.S. Code, was introduced by Senators Scott and Javits in February 1972, which would have reserved for the United States "the right to refuse extradition of a U.S. national to a foreign country for an offense defined in chapter 50A of title 18, U.S. Code, when the offense has been committed outside the United States; and

(a) Where the United States is competent to prosecute the person whose surrender is sought, and intends to exercise its jurisdiction; or

(b) Where the person whose surrender is sought has already been or is at the time of the request being prosecuted for such offense."

Although this draft legislation was never adopted, a similar bill would have to be acted on as a second step after ratification of the Genocide Convention, in order to provide means of effectuating the treaty, as provided for in the Convention. Until this is done, there would be no means to legally effectuate the treaty in regard to U.S. citizens.

Beyond this however, we should be looking ahead, and championing the rule of law in international affairs as the only alternative to continued war, violations of individual human rights, and illegal acts of terrorism. There is no reason why an International Criminal Court should not eventually be established and given jurisdiction over some genocide cases, under, of course, strict rules of due process.

In this regard, several proposals have already been made for the establishment of an International Criminal Court to try terrorists who are accused of violating existing international conventions against terrorism. As far back as 1920, Elihu Root, former U.S. Secretary of State and Nobel Prize winner, proposed the creation of such a court. He received the support of the League of Nation's Advisory Committee of Jurists, and the idea was endorsed by the Inter-Parliamentary Union in 1925, the International Law Association in 1926 and by experts who drafted a Convention to Repress Terrorism in 1935. In 1945, the United States took the lead in creating an international criminal court when Supreme Court Justice Jackson, on instructions from the President, convinced our allies to establish the International Military Tribunal at Nuremberg. Currently, the ABA is on record as favoring the creation of an International Criminal Court with jurisdiction to try those violating specific international conventions on terrorism. All such proposals have included provisions for strict due process procedures, and there has been some support in Congress for the establishment of such a court. (See H.C. Res. 328, 96th Congress 2nd)

We should also note here that recent administrations have recognized the need to establish better procedures and more continuity at the United Nations for the protection of human rights, and in this regard called for the creation of a U.N. High Commissioner for Human Rights. To our best knowledge, the United States has not changed its position on this matter. The eventual evolution of an International Tribunal to prosecute international human rights violations would be in line with the U.S. concern for the protection of individual human rights and its rationale in wanting the ability of the U.N. to act in human rights cases strengthened. As in the case of International Court of Justice, the enforcement powers of such a court would be subject to the Security Council where the United States has the veto power. In any event, such concerns are for future consideration. Ratification of the Genocide Convention in no way commits the United States to supporting the creation of or subscribing to the jurisdiction of an international tribunal, since under the concurrent jurisdiction doctrine, the United States itself could retain the option of hearing charges against its citizens itself.

What is of overriding concern now, is that the voice of our country as an advocate of the protection of individual human rights at international convocations is being dimmed by our failure to ratify the Genocide Convention. Time and again we are subject to being called hypocrites when we attempt to speak out for the sanctity of human life. Friend and foe alike cannot understand our failure to act. As stated in the 1973 written report of the Senate Foreign Relations Committee it is:

"As if genocide were rampant in the United States and this nation could not afford to have its actions examined by international organs—as if your Supreme Court would lose its collective mind and make of the treaty something it is not—as if we as a people don't trust ourselves and our society. The rhetoric of the opponents, and to a degree the proponents, has obscured what a modest step the convention represents.

"Philosophical, moral, and constitutional questions have been raised which go far beyond this modest step and probe man's relationship to his fellow man and the responsibilities of governments to protect the rights of their citizens. . . . As our planet becomes more crowded, man's behavior toward his fellows must be governed by standards ever higher and more humane. This treaty seeks to set a higher standard, of international morality, and should be judged on that basis."

As Chief Justice Earl Warren told an American audience in 1968, far from being among the last to ratify "we as a nation should have been the first to ratify the genocide convention." Now more than another dozen years have passed and still the U.S. Senate has not acted. We urge you to help rectify this blot on our good name by once again strongly recommending the ratification of the Genocide Convention, and exerting every effort to get this modest, but worthwhile treaty ratified by the Senate as a whole.

Under the auspices of the United States Holocaust Memorial Council, a gathering was convened at the Department of State from October 26–28, 1981. This unique "International Liberators Conference" brought together delegations from each of the fourteen countries which took part in the liberation of the Nazi concentration camps at the close of World War II. The following petition was signed by fifty of the fifty-nine American Representative Liberators present at the conference and addressed to the United States Senate.

INTERNATIONAL LIBERATORS CONFERENCE

Runyon C. Peterson, 3249-16 Ave. South, Fargo, N.D. 58103.

We, the undersigned, participated in the liberation of the Nazi concentration camps at the close of World War II. We saw with horror and revulsion the machinery of persecution and mass extermination, and as American military personnel, were able to play a unique role in halting the wheels of Nazi genocide.

The United States, which has long been a beacon of hope to the persecuted, should now make a clear statement to the world that it is forever opposed to the heinous act of genocide, and will seek to prevent its recurrence. We therefore call upon the United States Senate to grant its long overdue advice and consent to ratification of the Convention on the Prevention and Punishment of the Crime of Genocide.

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U.S. Refusal To Ratify Antigenocide Convention

(LDO42232 Moscow TASS in English 2015 GMT 4 Dec 81)

[Text] Washington, 4 Dec. TASS.—The United States that is trying to present itself as a proponent of human rights has been refusing for more than 30 years to ratify the convention on the prevention and punishment of the crime of genocide.

The Senate Foreign Relations Committee started once again discussing the question of ratifying the convention which was unanimously approved by the United Nations General Assembly back in 1948 and has been submitted for the ratification of the U.S. Congress during the presidency of Harry Truman. Since then the convention has been ratified by 84 states while the United States which describes itself as "the most democratic" society is still considering the signing of this humanitarian document.

Senator Rudy Boschwitz described this fact as a disgrace. He stated that genocide—the elimination of entire national, ethnic, racial and religious groups, is a grievous crime against humanity.

Speaking at the hearings, Senator William Proxmire stressed that the convention discussed is aimed at ensuring the fundamental human right, the right to live.

The United States' refusal to ratify the international convention on genocide and 15 other similar documents on human rights out of the 19 worked out by the United Nations cannot be assessed in any other way than as Washington's unwillingness to assume firm juridical commitments in the sphere of the insurance of human rights.

And this is not accidental. Genocide is openly practiced in the United States. It has been actually sanctioned by official authorities. A vivid example of this is the policy of the ruling circles with regard to the indigenous population of the United States, the Indians. They have been driven into reservations, have almost no opportunty to get decent education or skilled medical assistance and are doomed to extinction. The lifespan of Indians is half the average level in the United States. The rate of child mortality is high. Other national minorities in the United States—blacks, people of Latin American and Asian origin—are subjected to glaring discrimination and at times to unprovoked extermination.

Washington conducts the policy of genocide also on the international arena. Suffice it to recall atrocities of the U.S. military in Indochina that are comparable only to crimes of the Nazis, the plans of creating neutron weapons and other means of annihilation, the open course of preparing a nuclear war.

The speakers in the hearings noted that the United States' refusal to ratify this international convention puts Washington in the same set with the racist South African regime.

As it should be expected U.S. hawks—Senators Strom Thurmond, Jesse Helms sharply attacked the convention. They said they will do their utmost to prevent its ratification on the ground of its being, allegedly, unconstitutional.

Chairman of the Senate Foreign Relations Committee, Charles Percy, said that he will be pressing for the ratification of the convention. At the same time he noted that much will depend on the stand of the administration which, he said, just started considering the convention.

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